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No.

In the Supreme Court of the United States

October Term, 1983

GOLD CROSS AMBULANCE CO., INC. AND TRANSFER AND STANDBY SERVICES, INC.,
Petitioners,

vs.

CITY OF KANSAS CITY, METROPOLITAN AMBULANCE SERVICES TRUST, HADLEY REIMAL d/b/a AMBULANCE SERVICES, LAWRENCE HUGHES d/b/a AMBULANCE SERVICES, JUNE DeSAULNIERS d/b/a AMBULANCE SERVICES, EUGENE DeSAULNIERS d/b/a AMBULANCE SERVICES, AMBULANCE SERVICES, INC., FOURTH PARTY, INC. AND JACK STOUT,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PADEN, WELCH, MARTIN, ALBANO & GRAEFF, P.C.
MICHAEL W. MANNERS
Counsel of Record
C. ROBERT BUCKLEY
Law Building - 311 West Kansas
Independence, Missouri 64050
(816) 836-8000
Counsel for Petitioners

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTIONS PRESENTED FOR REVIEW

I. HAS THE STATE OF MISSOURI AFFIRMATIVELY EXPRESSED AND CLEARLY ARTICULATED A STATE POLICY TO ALLOW THE CITY OF KANSAS CITY TO PROVIDE FOR MONOPOLY NON-EMERGENCY AMBULANCE SERVICES BY EXCLUDING PETITIONERS FROM OPERATING WITHIN THE BOUNDARIES OF KANSAS CITY?

II. IF THE STATE OF MISSOURI HAS AFFIRMATIVELY EXPRESSED AND CLEARLY ARTICULATED A STATE POLICY WHICH AUTHORIZES THE CITY OF KANSAS CITY TO MONOPOLIZE AMBULANCE SERVICES BY EXCLUDING PETITIONERS FROM OPERATING WITHIN THE BOUNDARIES OF KANSAS CITY, MUST THE STATE ACTIVELY SUPERVISE THE ANTICOMPETITIVE ACTIVITIES OF KANSAS CITY AND OTHERS?

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OPINIONS BELOW

The opinion of the United States District Court for the Western District of Missouri is officially reported at 538 F.Supp. 956, and is set forth in Appendix B to this petition. The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 705 F.2d 1005, and is set forth in Appendix A to this petition.

JURISDICTION

The judgment and opinion of the United States District Court for the Western District of Missouri was filed on May 7, 1982. A timely notice of appeal was filed in the United States District Court for the Western District of Missouri appealing the decision of the district court to the United States Court of Appeals for the Eighth Circuit. The opinion of the United States Court of Appeals for the Eighth Circuit was filed on April 26, 1983. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

This case involves: Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2); the Missouri Antitrust Statute (§ 416.031, R.S.Mo.); § 67.300, R.S.Mo.; Chapter 190, R.S.Mo.; Kansas City Ordinance No. 50775; Kansas City Ordinance No. 50983; Kansas City Ordinance No. 53539. The pertinent provisions thereof are set forth in full in Appendix C.

STATEMENT OF THE CASE

Proceedings Below

Petitioners are corporations engaged in the ambulance business in the metropolitan Kansas City area. On December 23, 1980, Petitioners filed suit on this matter by filing a petition for damages and injunctive relief on December 23, 1980, in the Circuit Court of Jackson County, Missouri, which named as defendants, the City of Kansas City, Missouri (hereinafter "City"), Metropolitan Ambulance Services Trust (hereinafter "MAST"), Ambulance Service of Clay County, Inc. (hereinafter "ASI"), and five shareholders of ASI. The cause was thereafter removed by defendant, MAST, to the United States District Court for the Western District of Missouri on December 30, 1980, pursuant to 28 U.S.C. 1441(a) and assigned case number 80-1131-CV-W-5. On January 23, 1981, defendant, MAST, filed its Motion to Dismiss Plaintiffs' Complaint and a Counterclaim alleging violations of Section 1 of the Sherman Act by Gold Cross Ambulance Co., Inc. (hereinafter "Gold Cross"), and Transfer and Standby Services, Inc. (hereinafter "TSI"). Thereafter, the remaining defendants filed Motions to Dismiss and briefs in support thereof.

On March 5, 1981, MAST, after amending its Counterclaim on February 26, 1981, filed an application for temporary restraining order and preliminary injunction. The Court denied MAST's application for temporary restraining order and scheduled an evidentiary hearing on MAST's application for preliminary injunction on March 13, 1981. The parties appeared on that date and on March 16-17, 1981, for the evidentiary hearing on MAST's application. On April 6, 1981, the Court issued its Order denying MAST's application for preliminary injunction.

Thereafter, the Court denied the defendants' Motions to Dismiss the original complaint and granted leave to Gold Cross and TSI to amend their complaint on August 11, 1982. The First Amended Complaint contained five counts; Count I alleged violation of Section 1 of the Sherman Act; Count II alleged violation of Section 2 of the Sherman Act; Count III alleged violation of the Missouri Antitrust Statute; Count IV alleged violation of civil rights under 42 U.S.C. § 1983; and Count V alleged violations of the Fourteenth Amendment to the United States Constitution. Jurisdiction was based on 28 U.S.C. § 1331. On September 25, 1981, defendants, City, MAST, Fourth Party, Inc., and Jack Stout filed their Motions to Dismiss the First Amended Complaint. The remaining defendants filed their Motions to Dismiss on October 23, 1981. The Motions to Dismiss alleged that Gold Cross and TSI failed to state a claim upon which relief can be granted because the various defendants were exempt and immune from application of the Sherman Act and the Missouri Antitrust Statute, and because no constitutional rights of Gold Cross and TSI had been violated. On May 7, 1982, the district court filed its "Order Granting in Part and Denying in Part Defendants' Motions to Dismiss, which are being Treated as Motions for Summary Judgment." (A copy of the order is set out at Appendix B.)

Thereafter, Gold Cross and TSI appealed the district court's order which had been made final for the purposes of appeal by the district court pursuant to Rule 54(b), F.R.Civ.P. On April 26, 1983, the United States Court of Appeals for the Eighth Circuit affirmed the order of the district court. (A copy of the Court of Appeals' decision is set out at Appendix A.)

Details of the Case

Gold Cross and TSI operate ambulance businesses in the metropolitan Kansas City area from headquarters located in Independence, Missouri. They initially brought this lawsuit to challenge a continuing course of conduct which they allege threatens the existence of their businesses. This cause is essentially a challenge to the efforts by the various defendants to monopolize and restrain trade in the provision of ambulance services in the metropolitan Kansas City area. Kansas City and MAST, in combination with the other Defendants, have engaged in a course of conduct to implement what is commonly referred to as the "public utility" model of ambulance service. It is difficult to state the facts in this case because steps have been taken by the various defendants since the filing of the First Amended Complaint and the various Motions to Dismiss in response thereto in furtherance of the purported goal to implement this "public utility" model. Since these steps are not contained in the record on appeal, the Court may not consider those facts which were not considered by the trial court in reaching its decision on May 7, 1982. Thus, great care has been taken to ensure that the facts of those additional steps have not been included within this Statement of Facts.

To understand the basis for this lawsuit, it is necessary to return to the year 1978 when Eugene DeSaulniers, June DeSaulniers, Hadley Reimal, Lawrence Hughes and a fifth individual who is not a party, were operating at least five ambulance companies in the metropolitan Kansas City area. At some point in time during 1978, the various companies merged into a single company, ASI.

In the spring of 1979, Jack Stout, through his business, Fourth Party, Inc., began providing ambulance consulting services to Kansas City. At some point in time, a de-

cision was made by the various respondents to begin implementation of the "public utility" model. The public utility model is a unique method of providing ambulance services to the citizens of a geographic area. The basic tenet of the model is that a single company is given the exclusive right to provide all ambulance services in the geographic area.

Kansas City made the first step in the implementation of the model in September of 1979, when it enacted Ordinance No. 50775 which was essentially an ordinance governing the licensing of ambulance units, personnel and services operating within the corporate boundaries of Kansas City. This ordinance made it unlawful to operate an ambulance service within the boundaries of Kansas City without a license to do so (§ 18.197[A]). There were certain exceptions to the license requirement identified in Ordinance No. 50775 (§ 18.197[D]). If the ambulance service was engaged in a transfer which began outside of the city and ended either inside or outside the city, a license was not required. However, if a patient called an unlicensed ambulance service for a transfer from a home, nursing home or hospital within Kansas City to another destination within the boundaries of the city, that transfer would constitute a violation of the ordinance.

Ambulance service has traditionally been recognized as consisting of two clearly divisible elements—emergency and non-emergency. Great value is placed on response time in the emergency phase of ambulance service because usually there is some life-threatening event or some serious bodily injury or affliction which requires immediate pre-hospital medical attention. Traditionally, political subdivisions have taken a variety of approaches in meeting this need. While governmental units have been keenly interested in the provision of pre-hospital emergency care,

governmental units have not traditionally provided non-emergency transfer services. Although some entities have chosen to regulate non-emergency ambulance service, it is normally not provided by government but is provided by the private sector. Non-emergency transfers are generally handled by appointment and do not require immediate attention as is the case with emergency ambulance service.

Under the public utility model, the governmental body authorizes a single company to provide both emergency and non-emergency ambulance services. It was with the intent of implementing this system in 1979 that Kansas City created MAST and enacted Ordinance No. 50775.

Within the period of time during which the various Defendants have engaged in the conduct challenged in the First Amended Complaint, there is no evidence that Gold Cross and TSI have provided emergency ambulance services in Kansas City except on a very limited basis. Gold Cross has responded to "mutual aid" calls, which are calls from Kansas City to provide emergency ambulance service to a situation within the corporate boundaries of Kansas City because a decision is made by the Kansas City dispatcher that Gold Cross is able to respond to the occurrence in a more timely manner. Gold Cross and TSI have never competed with ASI, MAST, or Kansas City to provide emergency ambulance service. Nearly every transfer engaged in by Gold Cross and TSI in Kansas City has always been a non-emergency transfer. There is no evidence that Gold Cross and TSI battle in the streets of Kansas City for victims of accidents. Their patients have been picked up at nursing homes, hospitals and private residences for transfer to other hospitals, nursing homes and private residences on a strict non-emergency basis. If this transfer originates in Kansas City, it is a violation of Ordinance No. 50775 and succeeding ordinances. A substantial por-

tion of the business of Gold Cross and TSI has been derived from the transfers prohibited by Kansas City's ambulance licensing ordinance.

It is this system of ambulance service which Kansas City began implementing in combination with MAST, ASI, Jack Stout, Fourth Party, Inc., Eugene DeSaulniers, June DeSaulniers, Hadley Reimal and Lawrence Hughes in 1979, which Gold Cross and TSI have challenged in this lawsuit. Kansas City took further steps, after the creation of MAST and enactment of Ordinance No. 50775, to implement this monopolistic system of ambulance service. As previously stated, MAST entered into a series of continuing agreements with ASI which provided that ASI would be the sole provider authorized by the city to engage in all ambulance services. Apparently, ASI was the sole company licensed by the city pursuant to Ordinance No. 50775 (and its successor, No. 50983), although the court noted in its Order denying MAST's Application for Preliminary Injunction that there was considerable doubt whether ASI even had a city ambulance license.

Although Gold Cross and TSI had made application for city ambulance licenses, no action was ever taken upon their applications. At the time they filed their First Amended Complaint, Gold Cross and TSI had never been contacted by Kansas City or MAST nor had they ever been given an opportunity to negotiate with Kansas City to provide ambulance services in Kansas City. A decision was made among the various Defendants to totally exclude Gold Cross and TSI from any of the negotiations or meetings concerning implementation of the public utility model in Kansas City. It became clear at the time Gold Cross and TSI initiated this action that they would never be able to obtain licenses to provide any type of ambulance service within Kansas City and would be excluded

from conducting their businesses except on a very limited basis.

A few matters should be finally noted. First, Jack Stout (sole owner of Fourth Party, Inc.) is recognized as the architect of the public utility model. He served the City initially as a consultant, but also served as Director of MAST for a period of time.

Secondly, ASI was purchased by MAST while the various Motions to Dismiss were pending. Eugene DeSaulniers, June DeSaulniers, Hadley Reimal and Lawrence Hughes sold their stock in the corporation to MAST.

Finally, Ordinance No. 53539 was enacted by the Kansas City Council during the pendency of the Motions to Dismiss. This ordinance was the final legislative step in implementing the public utility model, following Ordinance No. 50775 and Ordinance No. 50983. Purchase of ASI was noted in the preamble to Ordinance No. 53539. By ordinance, Gold Cross and TSI have been totally excluded from operating their businesses within the boundaries of Kansas City except as provided in the listed exceptions in Section 18.206 of the ordinance.

REASONS FOR GRANTING THE WRIT

I.

This Court has previously considered two cases involving application of the Sherman Act to municipalities. In *City of Lafayette v. Louisiana Power & Light*, 435 U.S. 389 (1978) (hereinafter "*Lafayette*"), this Court decided that not every act of State agencies or subdivisions was exempt from the antitrust laws simply by reason of the agencies' or subdivisions' status. The plurality opinion of Justice Brennan reviewed the *Parker* doctrine, which was the Court's initial pronouncement concerning the liability of State agencies in *Parker v. Brown*, 317 U.S. 341 (1943), and noted:

> [T]he *Parker* doctrine exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly service.

Lafayette, supra, at 413.

The plurality was careful to note that the mere fact that a city was empowered to do certain things did not mean that it was acting pursuant to State policy.

> When cities, each of the same status under state law, are equally free to approach a policy decision in their own way, the anticompetitive restraints adopted as policy *by any one of them, may express its own preference rather than that of the state.* Therefore, in the absence of evidence that the state authorized or directed a given municipality to *act as it did*, the actions of a particular city hardly can be found to be pursuant to the state's *command* or to be restraints that the state as sovereign imposed.

(Emphasis added.) *Ibid.*, at 414.

The plurality went on to note that this does not mean that a city must be able to point to detailed legislative authorization for a particular restraint; rather an adequate mandate exists if it can be found "from the authority given a governmental entity to operate in a particular area, that the legislature *contemplated* the kind of action complained of." (Emphasis added.) *Ibid.*, at 415.

This Court did not apply this test in *Lafayette*, but left application of the standard articulated to the lower court. The next pronouncement of the test, as applied to municipalities, came in *Community Communications Co., Inc. v. City of Boulder*, 455 U.S. 40 (1982) (hereinafter "*Boulder*").

In *Boulder*, the city had enacted an ordinance prohibiting expansion of cable television operations within the city. Boulder claimed *Parker* immunity, pointing to the Home Rule Amendment to the Colorado Constitution which broadly granted cities autonomy over local affairs. It argued that Colorado contemplated the enactment of anticompetitive regulatory programs so that it must have contemplated the particular regulation in issue.

This Court reviewed the various plurality and majority opinions that had theretofore explored the limits of the *Parker* doctrine and concluded as follows:

> Our precedents thus reveal that Boulder's moratorium ordinance cannot be exempted from antitrust scrutiny unless it constitutes the action of the State of Colorado itself in its sovereign capacity . . . or unless it constitutes municipal action in *furtherance* or *implementation* of clearly articulated and affirmatively expressed state policy.

(Emphasis added.) *Ibid.*, at 52.

The Court rejected Boulder's argument that the State of Colorado had contemplated the city's cable television regulation:

> [P]lainly the requirement of "clear articulation and affirmative expression" is not satisfied when the State's position is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive. A state that allows its municipalities to *do as they please* can hardly be said to have "contemplated" the *specific anticompetitive actions* for which municipal liability is sought.

(Emphasis added.) *Ibid.*, at 55.

This Court perceived the logical extension of Boulder's argument:

> [I]n Boulder's view, it can pursue its course of regulating cable television competition, while another home rule city can choose to prescribe monopoly service, while still another can elect free-market competition: and all of these policies are equally "contemplated," and "comprehended within the powers granted." Acceptance of such a proposition—that the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances—would wholly eviscerate the concepts of "clear articulation and affirmative expression" that our precedents require.

Ibid., at 56.

In the present case, the United States Court of Appeals for the Eighth Circuit determined that "Missouri has authorized Kansas City's single-operator ambulance system," 705 F.2d, at 1012, and that "the Missouri legislature has evinced its intent to displace competition in

the ambulance industry, and that the state action doctrine thus applies in this case," 705 F.2d, at 1013.

In determining that Missouri has authorized Kansas City's single-operator ambulance system, the Eighth Circuit points to R.S.Mo. § 67.300 (1978), which permits a city to "contract with one or more" operators to provide ambulance service. The court determined that "this statute alone supports the district Court's finding that the state intended to displace unregulated competition in the ambulance industry." *Ibid.*

The Eighth Circuit further found that the Missouri legislature has envinced its intent to displace competition in the ambulance industry in enacting Chapter 190 of the Revised Statutes of Missouri, which contains the state licensing law. The Eighth Circuit apparently relied strongly on a decision in which the Missouri Supreme Court concluded that the "thrust of the Licensing Law" was "toward control of destructive competition and improvement of service." *City of Raytown v. Danforth*, 560 S.W.2d 846, 849 (Mo. 1977), cited at 705 F.2d, at 1013.

This case is appropriate for consideration by this Court because the Eighth Circuit's application of the "affirmative expression and clear articulation" requirement is in error and therefore relief should be granted to correct the error, and furthermore because this case is an appropriate vehicle for amplifying the perimeters of this requirement.

The *Boulder* decision was a logical and predictable result and a perfect method for limiting the "home rule" argument of all such cities in the United States. It was apparent after the *Lafayette* decision that if home rule cities could depend upon their status as such without more explicit authorization, the reasons for applying antitrust laws to municipalities—to prevent each city from pursuing its own independent parochial economic choices—would

be subverted. In *Boulder* the state law did nothing to regulate the subject of cable television and provided no state policy to guide municipalities as they attempted to regulate cable television franchisees. The issue that this case raises is whether an enabling statute that merely authorizes a city to do that which it otherwise could not do (in this case providing ambulance service by using any one of a number of different options permitted by the enabling statute) satisfies the "affirmative expression and clear articulation" requirement of *Lafayette*.

In this regard it is important to keep in perspective the purpose served by a statute like § 67.300. In Missouri (as in most States) a city only possesses those powers expressly granted to it by the State or those necessarily implied thereby. Any reasonable doubt as to whether a power has been delegated to a municipality is resolved in favor of nondelegation, *Anderson v. City of Olivette*, 518 S.W.2d 34, 39 (Mo. 1975).

The precise purpose of § 67.300 was to allow Missouri cities to do something that they could not do previously. As the Missouri Supreme Court noted in *City of Raytown v. Danforth, supra*, 560 S.W.2d, at 848:

> Section 67.300 is an enabling Act granting authority for activities not previously permitted cities of the fourth class, namely operation of ambulance service; however the authority conferred may not be extended beyond the legislative intendment.

Petitioners would submit that a statute that merely enables a city to do that which it could not otherwise do does not constitute municipal action in implementation of State policy.

Rather, Plaintiffs would submit that Missouri's position regarding the provision of ambulance service is one

of mere neutrality. Section 67.300 gives cities, counties, towns, and villages a wide range of policy options. Under § 67.300 cities may provide ambulance service (if they choose to provide *any* ambulance service) by one of three methods:

1) Acquire and supply suitable vehicles and operate the service itself;

2) Contract with one or more individuals, cities, counties, associations or other organizations for the operation of such vehicles which are acquired; or

3) Employ any combination of the methods authorized in the two options above.

The Eighth Circuit claimed that there was no neutrality in § 67.300 because the State *did* address the question of ambulance regulation therein. It contrasted the situation in *Boulder* by noting that the Colorado Constitution was silent on the subject of cable television regulation.

Petitioners would submit that the Eighth Circuit misperceived the vice of neutrality. The plurality in *Lafayette* recognized that when cities are free to approach a policy in their own way, the policies they adopt may express their own rather than State preferences, 435 U.S., at 414. Similarly, as this Court noted in *Boulder*: "A State that allows its municipalities to do as they please can hardly be said to have 'contemplated' the specific anticompetitive actions for which municipal liability is sought." 455 U.S., at 55. Simply because Missouri specifies that local governments may do as they please *about ambulance service* does not mean that the State policy is less neutral than that condemned in *Boulder*.

Section 67.300 contains the same fatal flaw that this Court recognized in *Boulder*. One city can choose to reg-

ulate competition, one "can choose to prescribe monopoly service, while still another can elect free-market competition: and all of these policies are equally 'contemplated,' and 'comprehended within the powers granted.'" *Ibid.*, at 56.

The Eighth Circuit's holding is not bolstered by Chapter 190 of the Revised Statutes of Missouri. That chapter provides for a detailed licensing scheme of the ambulance industry by the State of Missouri acting through its *own* administrative agency. It is not an instance where Missouri has chosen to "effect its policies through the instrumentality of its cities and towns." *Boulder*, 455 U.S., at 51. The fact that Missouri itself has chosen to restrict competition in Chapter 190 does not mean that it has thereby authorized local governments to do the same thing.

Because the State of Missouri has not affirmatively expressed and clearly articulated a policy to effect the regulation of competition in the ambulance industry by the instrumentality of its cities and towns, Kansas City's ordinance clearly does not fall within the purview of *Parker* immunity.

II.

Should this Court determine that the Eighth Circuit's application of the "affirmative expression and clear articulation" requirement is correct and that this is not an appropriate case for further consideration of that test, this case clearly provides the Court with an excellent opportunity to consider a question left open in *Boulder*—whether the "active state supervision" requirement expressed in *California Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), is applicable to cities. *Midcal* required as the second part of the two-prong test that the challenged anticompetitive restraint must be

"actively supervised by the state itself." *Ibid.*, at 106. It was this "active supervision" requirement in *Midcal* which this Court found lacking and led to disallowance of the *Parker* exemption; the Court found that the State did not "engage in any pointed reexamination of the program under scrutiny." *Ibid.*, at 106.

This Court has never applied the "active supervision" requirement to cities. In *Lafayette*, Justice Brennan acknowledged the origin of the requirement in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1970), when he stated:

> We emphasized, moveover, the significance to our conclusion of the fact that the state policy requiring the anticompetitive restraint as part of a comprehensive regulatory system, was one clearly articulated and affirmatively expressed as state policy, and that the State's policy was actively supervised by the State Supreme Court as the policymaker.

435 U.S., at 410.[1] In *Boulder*, the Court never reached the issue of the applicability of this test to municipalities because the city could not pass the first test. The Court left open the question whether the ordinance under scrutiny "must or could satisfy the 'active state supervision' test focused upon in *Midcal*." 455 U.S., at 51 n. 14.

At bar, the Eighth Circuit decided that this requirement did not apply to municipalities, 705 F.2d, at 1014-1015. Relying on the dissent of Justice Rehnquist in *Boulder*, the Court stated that "[t]o require the state to supervise Kansas City's ambulance system once the city has elected to exercise its authority to establish the system makes little sense," 705 F.2d, at 1014. The Eighth Circuit stated that:

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1. Justice Brennan's opinion in *Lafayette* was acknowledged in *Midcal* as requiring active supervision. 445 U.S., at 105.

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> Requiring state supervision could force the state and its municipalities to engage in duplicative, wasteful regulation and could erode the local autonomy that the state has sought to encourage. *See Town of Hallie v. City of Eau Claire*, *supra*, 1983-1 Trade Cases at 69, 339,"

705 F.2d, at 1015.[2]

The Eighth Circuit also stated that this Court has required active state supervision of the challenged restraint only in cases in which the defendants were private entities or individuals. *Ibid.*, at 1014. This is an erroneous description of this Court's holdings concerning this issue. Indeed, this Court announced that the active supervision requirement applied to public entities in *Bates v. State Bar of Arizona*, 433 U.S., at 362, recognized that holding again in *City of Lafayette v. Louisiana Power & Light*, 435 U.S., at 410, and cited *Lafayette* before applying the test to a private entity in *Midcal*, 445 U.S., at 105.

While this Court has not yet applied the "active supervision" requirement to cities, it is difficult to postulate reasons why political subdivisions should be treated differently than privately regulated industries. If the State must articulate a clear and affirmative policy and is not required to pointedly reexamine its application by political subdivisions, it would be fairly easy for political subdivisions to do as they please. If regulated private industries were authorized to engage in anticompetitive conduct and were left free to implement policies to effect that conduct,

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2. Indeed, the Eighth Circuit followed the Seventh Circuit in determining that the "active supervision" requirement did not apply to political subdivisions. The plaintiffs filed a petition for certiorari in *Town of Hallie v. City of Eau Claire*, 700 F.2d 376 (7th Cir. 1983), in May of 1983. It might therefore be appropriate and in the interests of judicial economy for this Court to consider these two cases together.

the devastating effects to the national economy would soon follow. Indeed, the States need not establish duplicative regulatory schemes; it would only be necessary to provide for some mechanism at the State level to examine each political subdivision's implementation of its policy to insure that the cities, counties, towns and villages are not pursuing parochial economic choices which would not only be injurious to their own citizens, but to neighboring political subdivisions as well.

Thus, the issue posed by this case goes far beyond the boundaries of Kansas City, Missouri and touches questions of federalism which lie at the core of our national political and economic system. It is for this reason that this case provides the Court with timely opportunity to resolve this question.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

MICHAEL W. MANNERS
(Counsel of Record)
C. ROBERT BUCKLEY
Law Building - 311 West Kansas
Independence, Missouri 64050
(816) 836-8000
Attorneys for Petitioner

APPENDIX

APPENDIX A

GOLD CROSS AMBULANCE AND TRANSFER
and Standby Service, Inc., Appellants,

v.

CITY OF KANSAS CITY, Metropolitan Ambulance Services Trust, Hadley Reimal d/b/a Ambulance Services, Lawrence Hughes d/b/a Ambulance Services, June DeSaulniers d/b/a Ambulance Services, Eugene DeSaulniers d/b/a Ambulance Services, Ambulance Services, Inc., Fourth Party, Inc. and Jack Stout, Appellees.

No. 82-1913.

United States Court of Appeals,
Eighth Circuit.

Submitted Feb. 16, 1983.

Decided April 26, 1983.

Two privately run ambulance services brought suit alleging antitrust violations based on city's ambulance system under which municipal trust contracted with single private operator to provide all ambulance service within city, and suit was removed to federal court by municipal trust. The United States District Court for the Western District of Missouri, John R. Gibson, Circuit Judge, sitting by designation, 538 F.Supp. 956, granted summary judgment in favor of city, municipal trust and consultants on antitrust claims and in favor of all defendants on constitutional claims, and plaintiffs appealed. The Court of Appeals, Heaney, Circuit Judge, held that: (1) city, mu-

nicipal trust and consultants they retained were shielded from federal and state antitrust liability because they established municipal ambulance system pursuant to state authorization and a clearly articulated and affirmatively expressed state policy to displace free competition in the ambulance business; (2) challenged ordinance satisfied rational basis test and thus did not deny private ambulance services substantive due process; and (3) private ambulance services, which had pointed to nothing that gave them legitimate claim of entitlement to city ambulance license, lacked standing to assert any rights possessed by city residents.

Affirmed.

1. Monopolies (Key) 12(15.5)

An expression of state policy that is sufficient to establish antitrust immunity under state action doctrine is comprised of legislative authorization of challenged activity with intent to displace competition.

2. Monopolies (Key) 12(16)

Where state had enacted comprehensive regulatory scheme that expressly authorized various elements of single-operator ambulance system adopted by city, and where state legislature had evinced its intent to displace unregulated competition in the ambulance industry, city, municipal trust and consultants they retained were shielded under state action doctrine from federal and state antitrust liability in connection with municipal ambulance system under which trust contracted with single private operator to provide all ambulance service within city. V.A.M.S. §§ 67.300, 190.005 et seq., 190.105, subd. 1, 190.115, 190.120, 190.145, 190.175; Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

3. Monopolies (Key) 12(15.5)

For purposes of state action doctrine, a sufficient state policy to displace competition exists if challenged restraint is necessary or reasonable consequence of engaging in authorized activity; state does not have to compel or command city's action.

4. Monopolies (Key) 12(15.5)

State action doctrine does not require that challenged restraint be actively supervised by state, and thus city, municipal trust, and consultants were shielded from federal and state antitrust liability pursuant to state action doctrine in connection with their implementation of single-operator ambulance system to provide all of city's ambulance service regardless of whether state actively supervised implementation of system. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

5. Constitutional Law (Key) 276(1), 297

Rational basis existed for ordinance under which city established single-operator ambulance system to provide all of city's emergency and nonemergency service and which was designed to promote public health, safety and welfare, and thus private ambulance services were not denied substantive due process on theory that city ambulance system deprived them of freedom to contract with potential customers and freedom to engage in a lawful business. U.S.C.A. Const.Amends. 5, 14.

6. Constitutional Law (Key) 89(1)

There is no absolute right to contract free of state regulation under the police power.

7. Constitutional Law (Key) 297

Since challenged ordinance establishing a single-operator city ambulance system did not involve fundamental right or suspect class, defendants had only to dem-

onstrate that ordinance was designed to accomplish objective within government's police power, and that rational relationship existed between ordinance's provisions and its purpose. U.S.C.A. Const.Amends. 5, 14.

8. Federal Civil Procedure (Key) 103

Private ambulance services, which were principally interested in operating their businesses profitably while city residents were primarily concerned with receiving high quality ambulance service at lowest possible cost, lacked standing to assert claim that metropolitan area citizens were deprived of their right to select ambulance company by city's implementation of single-operator ambulance system to provide all of city's ambulance service.

9. Constitutional Law (Key) 297

To sustain procedural due process claim, private ambulance services had to first establish that they possessed legitimate claim of entitlement to ambulance license issued by city; they could demonstrate such a claim of entitlement by showing that they had reasonable expectancy of receiving municipal license based on state or local statutes or regulations, or upon express contract or mutual understanding. U.S.C.A. Const.Amends. 5, 14.

10. Constitutional Law (Key) 297

Private ambulance services, which failed to demonstrate that there were any state or city statutes or regulations or alternatively any agreements between the parties that gave them a legitimate claim of entitlement to a municipal ambulance license could not recover on procedural due process claim that city issued its exclusive ambulance license and renewed that license without following ordinance requirements and without giving private services notice and opportunity to be heard. U.S.C.A. Const. Amends. 5, 14.

George E. Leonard, Russell S. Jones, Jr., Shughart, Thomson & Kilroy, P.C., Kansas City, Mo. for Metropolitan Ambulance Services Trust, Ambulance Service, Inc., Jack Stout and Fourth Party, Inc.

Sam B. Mumma, William D. Geary, Asst. City Attys., Kansas City, Mo., for City of Kansas City, Mo.

Paden, Welch, Martin, Albano & Graeff, P.C., Michael W. Manners, C. Robert Buckley, Independence, Mo., for appellants.

Before HEANEY, McMILLIAN and ARNOLD, Circuit Judges.

HEANEY, Circuit Judge.

The issue we face here is whether the City of Kansas City, the Metropolitan Ambulance Services Trust (MAST), and various other defendants[1] violated the federal and state antitrust laws and the United States Constitution by implementing a single-operator ambulance system to provide all of the city's emergency and nonemergency service. We hold that Kansas City, MAST, and the consultants they retained are shielded from federal and state antitrust liability because they established the municipal ambulance system pursuant to state authorization and a clearly articulated and affirmatively expressed state policy to displace free competition in the ambulance business. We further hold that none of the defendants deprived the plaintiffs of their constitutional rights to due process. The district court's judgment, therefore, 538 F. Supp. 956, is affirmed.

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1. In addition to Kansas City and MAST, the plaintiffs named as defendants Ambulance Service, Inc. (ASI), the current holder of the city's exclusive ambulance license; four individual shareholders of ASI who had consolidated their previously private companies; Jack Stout, a consultant who helped develop the city's ambulance system; and Stout's company, Fourth Party, Inc.

I.

BACKGROUND

Kansas City, Missouri, has established a municipal ambulance system under which a municipal trust, MAST, contracts with a single private operator to provide all of the ambulance service—both emergency and nonemergency—within the city. In November, 1979, MAST awarded the initial exclusive contract to Ambulance Service, Inc. (ASI), a corporation which had been formed earlier that year by the merger of the five existing private ambulance companies located in Kansas City. MAST has since renewed this contract and ASI continues to be Kansas City's exclusive provider of ambulance service.

Because ASI holds the city's sole ambulance license, other ambulance companies in the metropolitan area are denied access to most of the Kansas City market. They can transport into Kansas City patients whom they have picked up outside the city limits, and they can travel through the city on their way to other municipalities. They cannot, however, pick up any patients within the Kansas City borders.

Dissatisfied with these restrictions, plaintiffs Gold Cross Ambulance, Inc. (Gold Cross), and Transfer and Standby Services, Inc. (Transfer)—two private companies located in suburban Independence, Missouri—brought this five-count action, alleging that the defendants had violated federal and state antitrust laws and deprived the plaintiffs and Kansas City residents of various constitutional rights.[2]

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2. The plaintiffs originally filed their action in state court, alleging only Missouri antitrust law violations and constitutional claims under the fourteenth amendment and 42 U.S.C. § 1983. Defendant MAST removed the case to federal court, and filed a counterclaim alleging that the plaintiffs violated the federal antitrust laws. The plaintiffs then amended their complaint to include their Sherman Act claims.

On May 7, 1982, the district court granted summary judgment in favor of defendants Kansas City, MAST, Jack Stout and Fourth Party, Inc., on the plaintiffs' antitrust claims, but denied it to the individual shareholders of ASI on these counts. 538 F.Supp. 956, 967-970 (W.D.Mo. 1982). The court also granted summary judgment in favor of all defendants on the plaintiffs' constitutional claims. *Id.* at 970-973. The plaintiffs now appeal.[3]

II.

FACTS

Kansas City for many years provided emergency ambulance services to its citizens by operating a public ambulance system through the Kansas City General Hospital and, later, through the city Fire Department. In the early 1970s, however, Kansas City began to contract with five competing, private companies for emergency ambulance service. A central dispatch center allocated calls among the various companies on a "round-robin" basis. In 1973, the dispatch center adopted a policy of dispatching the closest available ambulance to the scene of the accident, regardless of which company owned the vehicle.

In 1978, a controversy developed concerning the slow response time by the private ambulance companies to emergency calls. As a result, the city formed a Public Safety Improvement Committee to investigate alternatives for improving emergency medical service. The Committee reported its findings to the city council on March 21, 1979, and recommended that the city adopt a publicly controlled ambulance system which utilized a single provider for

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3. The appeal is properly before this Court because the district court directed entry of final judgment pursuant to Fed. R.Civ.P. 54(b) on plaintiffs' claims against which it granted summary judgment.

both emergency and nonemergency services. Within two weeks, the city council approved a resolution committing Kansas City to such a system. In April, 1979, the city retained a consulting firm to study the implementation of a single-provider system.

Jack Stout, the consultant, was the recognized developer of the so-called "public utility model" of ambulance service in which a single operator replaces competing private companies. This model is designed to eliminate the incentive created by free-market delivery of ambulance service by private companies to neglect emergency ambulance service in favor of the more profitable nonemergency business.

This incentive to neglect emergency service arises from the cost structure of the ambulance business. The fixed cost of providing emergency service is very high because expensive advanced life support equipment is required and because sufficient capacity to meet peak demand within an adequate response time must be maintained, even though that full emergency capacity is seldom utilized. In contrast, the cost of handling nonemergency ambulance service with the idle excess capacity is low. Moreover, the fee-collection rate for nonemergency service is substantially higher than for emergency service. Thus, nonemergency calls are significantly more profitable than emergency calls, and private ambulance companies operating in an unregulated market have a strong incentive to concentrate on providing nonemergency service rather than quick, high quality emergency care.

To resolve these problems, the public utility model advocates the following approach: first, a city contracts with a single operator to provide all municipal ambulance service within medical care and response time standards set by public officials. The city then collects from each

patient the fee for services rendered by the company. If the ambulance company fulfills its contractual requirements, it receives payment regardless of whether the city has been able to collect all fees due. If the city collects insufficient fees to cover the amount owed to the ambulance company, the city makes up the deficit as a government subsidy. Finally, the city owns all the ambulance service equipment to prevent service from being interrupted if the operator encounters financial difficulty.

Thus, the public utility model, in theory at least, eliminates the incentive to favor nonemergency calls because the operator is paid only the contractual sum and this payment is not conditioned on the collection of user fees. For this model to be economically feasible, however, the municipally-licensed operator should be the only ambulance service allowed to do business in the city. If other private companies are permitted to operate in the city, they will retain the strong incentive to take the high profit nonemergency calls and leave the less-profitable emergency business to the city system.

In September, 1979, the Kansas City council passed an ordinance formally adopting the public utility model for city ambulance service and creating a nonprofit public trust, MAST, to implement and manage the new system. Several problems prevented Kansas City from implementing its plan, however. Missouri law requires all ambulance service operators to have a state-issued license,[4] which MAST did not possess. Moreover, MAST did not own the equipment necessary to provide full ambulance service to the city. Thus, MAST could not provide a bidder with either the license or the equipment necessary to implement the public utility model.

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4. Mo.Rev.Stat. §§ 190.105, 190.125.

Consequently, in October, 1979, the city council repealed its September ordinance. The successor ordinance, while retreating from full implementation of the public utility model, reiterated Kansas City's commitment to the concept. Thereafter, MAST contracted with ASI, which possessed the requisite state license and equipment, to provide the city's ambulance service. MAST apparently issued the exclusive municipal license to ASI without complying with the competitive bidding procedures required by city ordinance because, according to defendant Kansas City, ASI was the only state-licensed company in the area that possessed sufficient equipment to provide ambulance service on a single-provider basis.

Eventually, in December, 1980, the city council directed MAST to fully implement the public utility model.[5] In September, 1981, MAST purchased all of ASI's outstanding stock, thereby obtaining the company's equipment and state license. Thereafter, on December 17, 1981, the city council passed Ordinance 53539, which directed MAST to fully implement the public utility model.[6]

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5. Shortly thereafter, Gold Cross and Transfer filed their action in state court. After the plaintiffs commenced their lawsuit, no further action apparently was taken on the license applications they had pending with MAST.

6. Ordinance 53539, of course, requires MAST to contract with a single operator to provide all of Kansas City's ambulance service. In addition, it establishes an Emergency Physicians Advisory Board which appoints an ambulance service Medical Director and makes recommendations for the improvement of ambulance service. The ordinance also gives the city's Director of Health authority to promulgate rules, regulations and standards necessary to implement the public utility system. The Director of Health is empowered to establish standards for clinical performance, patient care, response time and medical protocols, and to develop procedures for medical control over the delivery of advanced life support by ambulance personnel. Finally, the ordinance requires all ambulance drivers, attendants, and dispatchers to obtain permits from the Director of Health.

Thus, pursuant to Ordinance 53539, Kansas City has adopted a publicly controlled, single-operator ambulance system. The plaintiffs challenge that system, contending that the defendants have violated the federal and state antitrust laws and the United States Constitution by implementing it.

III.

ANTITRUST CLAIMS

The district court found that the state action doctrine shields defendants Kansas City, MAST, Jack Stout and Fourth Party, Inc., from liability under the federal antitrust laws.[7]

A. The State Action Doctrine.

In *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), the Supreme Court first addressed the question of whether the federal antitrust laws prohibit a state from exercising its sovereign powers to impose cerain anticompetitive restraints. It held that a marketing program enacted by the California legislature to create price supports for raisins was exempt from challenge under the Sherman Act because the program "derived its authority * * * from the legislative command of the state." *Id.* at 350, 63 S.Ct. at 313. The Court stated:

> We find nothing in the language of the Sherman Act or in its history which suggests that its purpose

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7. The district court held that because the state action doctrine exempted these four defendants from liability under the federal antitrust laws, it also exempted them under Missouri antitrust statutes. 538 F.Supp. 956, 970 (W.D.Mo.1982). It held that Stout and Fourth Party, Inc., shared the state action exemption of Kansas City and MAST because they did nothing beyond what they were authorized to do by the city and MAST. *Id.* at 969-970. The plaintiffs do not challenge either of these conclusions by the court below; rather, they contend that it erred in holding that the state action doctrine is applicable here.

> was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

Id. at 350-351, 63 S.Ct. at 313-314.

Subsequent decisions have refined the *Parker* state action doctrine. *E.g., Goldfarb v. Virginia State Bar,* 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975); *Cantor v. Detroit Edison Co.,* 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed. 2d 1141 (1976); *Bates v. State Bar of Arizona,* 433 U.S. 355, 97 S.Ct. 2691, 2694, 53 L.Ed.2d 810 (1977). In *City of Lafayette v. Louisiana Power & Light Co.,* 435 U.S. 389, 98 S.Ct. 1123, 55 L.Ed.2d 364 (1978), the Supreme Court faced the question of whether the state action doctrine protected a municipality from federal antitrust liability. A plurality of four justices rejected the claim that the state action doctrine extended to "all governmental entities, whether state agencies or subdivisions of a State * * * simply by reason of their status as such." *Id.* at 408, 98 S.Ct. at 1134. The justices nonetheless recognized that municipalities are instrumentalities of the state, and their actions may reflect state policy. *Id.* at 413, 98 S.Ct. at 1136. The plurality thus held that "the Parker doctrine exempts only anticompetitive conduct engaged in * * * by [municipalities], pursuant to state policy to displace competition with regulation or monopoly public service." *Id.*

The plurality observed that a state policy to displace competition could not be found "in the absence of evidence that the state authorized or directed a given municipality

to act as it did." *Id.* at 414, 98 S.Ct. at 1137. It concluded, however, that "an adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is 'found from the authority given a governmental entity to operate in a particular area, that the legislature *contemplated* the kind of action complained of.'" *Id.* at 915, 98 S.Ct. at 1138 (citation omitted) (emphasis added).

Recently, in *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 102 S.Ct. 835, 70 L.Ed.2d 810 (1982), the Supreme Court had another opportunity to address the application of the state action doctrine to municipal conduct. It held that the doctrine did not shield the city from antitrust liability when the regulation in question was based only on the state's broad grant of home rule power to the municipality. *Id.*

In rejecting Boulder's state action defense, the Court held that the city failed to establish the requirement that its challenged restraint constituted either "the action of the State of Colorado itself in its sovereign capacity, * * * [or] municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy." *Id.* at 52, 102 S.Ct. at 841 (citations omitted). The Court emphasized that this standard for determining the applicability of the state action doctrine was fully consistent with the one adopted by the plurality in *City of Lafayette v. Louisiana Power & Light Co., supra.*[8]

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8. The Court stated:

> [The view of the *Lafayette* plurality that municipal conduct is not exempt unless it is "pursuant to a state policy to displace competition"] was simply a recognition that a State may frequently choose to effect its policies through the instrumentality of its cities and towns. It was stressed, however, that the "state policy" relied upon would have to be

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B. The Present Case.

There is no claim here that Ordinance 53539 enacted by Kansas City constitutes the action of the State of Missouri itself in its sovereign capacity. Thus, the issue is whether it constitutes action in furtherance or implementation of a clearly articulated and affirmatively expressed state policy. *Community Communications Co. v. City of Boulder, supra*, 455 U.S. at 52, 102 S.Ct. at 841.

[1] An expression of state policy that is sufficient to establish *Parker* immunity is comprised of two elements: The legislature must have authorized the challenged activity, and it must have done so with an intent to displace competition. *See* Areeda, Antitrust Law ¶ 212.3a, at 53 (1982 Supp.). *See also Community Communications Co. v. City of Boulder, supra*, 455 U.S. at 51-52, 102 S.Ct. at 840-841; *City of Lafayette v. Louisiana Power & Light Co., supra*, 435 U.S. at 415, 98 S.Ct. at 1138.

[2] The first element of this test is plainly satisfied here. The State of Missouri has enacted a comprehensive regulatory scheme which expressly authorizes the various elements of the single-operator ambulance system adopted by Kansas City. *See supra*, at 1010 & n. 6 (describing the city ambulance system). The state permits cities to provide ambulance service to its citizens, to acquire the necessary equipment to "contract with one or more" oper-

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Footnote continued—

> "clearly articulated and affirmatively expressed." [435 U.S.] at 410 [98 S.Ct. at 1135]. * * * This standard has since been adopted by a majority of the Court. *New Motor Vehicle Board of California v. Orrin W. Fox Co.*, 439 U.S. 96, 109 [99 S.Ct. 403, 411, 58 L.Ed.2d 361] (1978); *California Retail Liquor Dealers Assn. v. Midcal Aluminum Inc.*, 445 U.S. 97, 105 [100 S.Ct. 937, 943, 63 L.Ed.2d 233] (1980). [Footnote omitted.]

Community Communications Co. v. City of Boulder, 455 U.S. 40, 50-51, 102 S.Ct. 835, 840, 70 L.Ed.2d 810 (1982).

ators to provide the ambulance service, and to promulgate rules to regulate the provision of that service. Mo.Rev. Stat. § 67.300.[9]

The state has enacted additional laws concerning ambulance service in Chapter 190 of Missouri Revised Statutes.[10] This chapter permits municipalities to impose their own restrictions on ambulance service in addition to those imposed by the state. Section 190.105.4 provides that the issuance of a state license does not authorize operation of an ambulance "without a franchise in any county, municipality or political subdivision which has enacted an ordinance making it unlawful to do so." Section 190.105.5

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9. Section 67.300 of Missouri Revised Statutes provides:

1. Any county, city, town or village may provide a general ambulance service for the purpose of transporting sick or injured persons to a hospital, clinic, sanatorium or other place for treatment of the illness or injury, and for that purpose may

(1) Acquire by gift or purchase one or more motor vehicles suitable for such purpose and may supply and equip the same with such materials and facilities as are necessary for emergency treatment, and may operate, maintain, repair and replace such vehicles, supplies and equipment;

(2) Contract with one or more individuals, municipalities, counties, associations or other organizations for the operation, maintenance and repair of such vehicles and for the furnishing of emergency treatment;

(3) Employ any combination of the methods authorized in subdivisions (1) and (2) of this section.

2. The municipality or county shall formulate rules and regulations for the use of the equipment and may fix a schedule of fees or charges to be paid by persons requesting the use of the facilities and provide for the collection thereof.

* * *

10. Section 190.105.1 requires all ambulance operators to be licensed by the State of Missouri, and Section 190.125 requires an annual showing of need for each state ambulance license issued. Sections 190.115 and 190.120 set out the equipment and the kind of insurance coverage which each licensed ambulance must have. Section 190.145 lists the qualifications which ambulance service personnel must meet, and Section 190.175 details the records which each ambulance license holder must maintain.

provides that municipalities may adopt ambulance service ordinances that do not conflict with state law.

The foregoing statutes plainly establish that the first element of the *Parker* doctrine is present here: Missouri has authorized Kansas City's single-operator ambulance system. The second and more difficult question is whether Missouri has intended to displace competition with regulation or monopoly service. *See supra*, at 1011-1012. The district court found that such an intent existed, stating that "the state's policy [was] to place anticompetitive restraints on ambulance service," and that its regulatory scheme "clearly indicates an intent to regulate the provision of ambulance service on the basis of public need rather than to allow unbridled competition." 538 F.Supp. at 965.

[3] The Supreme Court has made clear that "a specific, detailed legislative authorization" of monopoly service need not exist to infer the necessary state intent. *City of Lafayette v. Louisiana Power & Light Co., supra*, 435 U.S. at 415, 98 S.Ct. at 1138. It is sufficient that " 'the legislature contemplated the kind of action complained of.' " *Id.* (citation omitted).[11] In other words, a suffi-

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11. The plaintiffs contend that state authorization or contemplation of municipal action is insufficient to satisfy the state action doctrine; rather, they apparently suggest that the state must compel or command the city's action. We disagree. *Accord Town of Hallie v. City of Eau Claire*, 1983-1 Trade Cases ¶ 65,227, at 69,337 (7th Cir. Feb. 17, 1983).

In *Community Communications, Inc. v. City of Boulder*, 455 U.S. 40, 54-57, 102 S.Ct. 835, 842-844, 70 L.Ed.2d 810 (1982), the Supreme Court did not require state compulsion of the city's conduct as a prerequisite to state action immunity. In fact, the *Community Communications* Court, *id.* at 55-56, 102 S.Ct. at 843-844, repeated with approval the language regarding state authorization or contemplation of the challenged restraint used by the plurality in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 98 S.Ct. 1123, 55 L.Ed.2d 364 (1978). *See* Areeda,

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cient state policy to displace competition exists if the challenged restraint is a necessary or reasonable consequence of engaging in the authorized activity. Areeda, Antitrust Law, *supra*, ¶ 212.3, at 54; Areeda, *Antitrust Immunity for "State Action" After Lafayette*, 95 Harv.L.Rev. 435, 446 (1981).

Section 67.300 of Missouri Revised Statutes, which permits a city to "contract with one or more" operators to provide ambulance service, plainly contemplates the conduct about which the plaintiffs complain here. Because monopoly service is the necessary consequence of having only one municipal ambulance operator as authorized by Missouri law, this statute alone supports the district court's finding that the state intended to displace unregulated competition in the ambulance industry.

Moreover, the state has also enacted its own anticompetitive scheme for regulating ambulance service in Missouri, which applies in addition to any municipal regulation. Mo.Rev.Stat. §§ 190.100 *et seq.* This chapter requires all ambulance operators and vehicles to be licensed by the state; mandates the necessary equipment and insurance coverage for all ambulances; details the types of records that all ambulances must keep; and provides that

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Footnote continued—

Antitrust Law ¶ 212.5, at 59-61 (1982 Supp.) (concluding that state need not compel the challenged restraint as a prerequisite to application of the *Parker* doctrine to municipal conduct).

In fact, the Supreme Court has used language demanding state compulsion only in cases involving private defendants. *E.g., Cantor v. Detroit Edison Co.*, 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975). In any event, in its most recent case involving private conduct, the Supreme Court required, as prerequisites for *Parker* immunity, a state policy to displace competition and active state supervision rather than state compulsion of the challenged practice. *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105, 100 S.Ct. 937, 943, 63 L.Ed.2d 233 (1980).

no ambulance may be licensed without an annual determination by the state license officer that "public convenience and necessity require the proposed ambulance service." *See* note 10, *supra*. Indeed, the Missouri Supreme Court, in *City of Raytown v. Danforth*, 560 S.W.2d 846, 848 (Mo. 1977) (en banc), expressly held that Mo.Rev.Stat. § 67.300, which authorizes cities to set up their own ambulance systems, does *not* allow a city to circumvent the state's licensing and regulatory requirements contained in Mo. Rev.Stat. § 190.100 *et seq*. The "thrust of the Licensing Law," the court concluded, was "toward control of destructive competition and improvement of service." *Id*. at 849.

Accordingly, we believe the Missouri legislature has evinced its intent to displace competition in the ambulance industry, and that the state action doctrine thus applies in this case. The plaintiffs, however, vigorously argue that the Supreme Court's decision in *Community Communications Co. v. City of Boulder supra*, renders the doctrine inapplicable here. In that case, the city council passed an ordinance prohibiting a cable television operator in Boulder from expanding its business for three months while the council drafted an ordinance to regulate the cable television market in the city. 455 U.S. at 45-46, 102 S.Ct. at 837-838. The Supreme Court held that *Boulder* could not invoke the state action doctrine because the home rule amendment to the Colorado constitution upon which the city based its moratorium was not a sufficient "clear articulation and affirmative expression" of a state policy to restrain trade in the cable television business. *Id*. at 52-56, 102 S.Ct. at 841-843. The Court reasoned:

> [P]lainly the requirement of "clear articulation and affirmative expression" is not satisfied when the State's position is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive.

> A State that allows its municipalities to do as they please can hardly be said to have "contemplated" the specific anticompetitive actions for which municipal liability is sought.

Id. at 55, 102 S.Ct.at 843 (emphasis included).

The plaintiffs contend that Missouri's position in Mo. Rev.Stat. § 67.300 is similarly one of "mere neutrality" regarding municipally operated ambulance service because it permits cities "to contract with one or more" providers. We disagree. In *Community Communications*, the Supreme Court emphasized that the home rule provision on which the city relied did not even address the subject of cable television and no other state cable television regulation existed.[12] *See* Note, *Municipalities and the Antitrust Laws: Home Rule Authority is Insufficient to Ensure State Action Immunity*, 35 Vand.L.Rev. 1041 (1982).

In this case, there has been an "affirmative addressing of the subject by the State," the decisive factor missing in *Community Communications*. Indeed, sections 67.300 and 190.11 *et seq.* of Missouri Revised Statutes show that the state has not only *affirmatively addressed* the subject of ambulance service on the local level, but has "clearly

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12. The Supreme Court stated:

> Nor can those actions [by the city] be truly described as "comprehended within the powers *granted*," since the term, "granted," necessarily implies an affirmative addressing of the subject by the State. The State did not do so here: The relationship of the State of Colorado to Boulder's moratorium ordinance is one of precise neutrality. As the majority in the Court of Appeals below acknowledged: "[W]e are here concerned with City action in the absence of any regulation whatever by the State of Colorado. Under these circumstances there is no interaction of state and local regulation. We have only the action or exercise of authority by the City."

Community Communications Co. v. City of Boulder, supra, 455 U.S. at 56, 102 S.Ct. at 843 (citation omitted) (emphasis included).

articulated and affirmatively expressed" a state policy which authorizes Kansas City to provide ambulance service to its residents by means of a single provider. The state action test articulated by the Supreme Court in *Lafayette* and *Community Communications*, therefore, is satisfied.

[4] The district court, relying on *California Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 104-106, 100 S.Ct. 937, 942-943, 63 L.Ed.2d 233 (1980), concluded that the state action doctrine also required that the challenged restraint must be actively supervised by the state. We do not agree with that conclusion.[13]

The Supreme Court has required active state supervision of the challenged restraint only in cases in which the defendants were private entities or individuals. *See, e.g., California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., supra*, 445 U.S. at 99, 100 S.Ct. at 940; *Cantor v. Detroit Edison Co., supra*, 428 U.S. at 582, 96 S.Ct. at 3113; *Goldfarb v. Virginia State Bar, supra*, 421 U.S. at 775, 95 S.Ct. at 2007. In this context, the state supervision requirement is intended to control the potential for abuse created by authorizing private persons to make anticompetitive decisions and to insure that those decisions are consistent with the clearly articulated and affirmatively expressed state policy at stake. Because municipal officials generally are politically accountable to the citizens they represent for their decisions regarding the challenged restraint, state supervision is not as necessary to prevent

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13. The provision of ambulance service by Kansas City is a traditional governmental function designed to protect public health and safety. *See* Note, *The Supreme Court, 1981 Term*, 96 Harv.L.Rev. 268-278 (1982). We need not address the question of whether municipal conduct which is outside the scope of such a traditional governmental function and which may pose a more significant threat to competition may require active state supervision to qualify for protection under the *Parker* doctrine. *Id.*

abuse as in the private context. *See Town of Hallie v. City of Eau Claire, supra,* 1983-1 Trade Cases at 69,338-69,339.

Moreover, because the *Parker* doctrine requires that the state delegate to the local government the authority to engage in the challenged conduct, state supervision of Kansas City's conduct is unnecessary to find state action. *Id.* at 69,639. As a leading commentator recently noted:

> requiring state authorization for local conduct is analogous to requiring active supervision of private conduct; it tests whether challenged local activity is truly state action and therefore entitled to immunity.

Areeda, Antitrust Law, *supra,* ¶ 212.2a, at 47 (footnote omitted).

We also believe that requiring active state supervision over a municipal function such as the one present here is unwise. The State of Missouri has authorized its municipalities to provide ambulance service because it believes that such service is a proper local activity. To require the state to supervise Kansas City's ambulance system once the city has elected to exercise its authority to establish the system makes little sense. As the dissent in *Community Communications Co. v. City of Boulder, supra,* 455 U.S. at 45-46 & n. 6, 102 S.Ct. at 837-838 & n. 6 (Rehnquist, J., dissenting), observed in concluding that the state supervision requirement does not apply to municipal conduct, "[i]t would seem rather odd to require municipal ordinances to be enforced by the State rather than the city itself."[14] Finally, requiring state supervision

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14. Because the majority in *Community Communications, Inc. v. City of Boulder, supra,* found that the challenged restraint was not in furtherance of a clearly articulated and affirmatively expressed state policy, it explicitly declined to determine whether the "active state supervision" requirement applied to municipal conduct. 455 U.S. at 51 n. 14, 102 S.Ct. at 840 n. 14.

could force the state and its municipalities to engage in duplicative, wasteful regulation and could erode the local autonomy that the state has sought to encourage. *See Town of Hallie v. City of Eau Claire, supra,* 1983-1 Trade Cases at 69,339.

Accordingly, we believe that the state action doctrine is applicable in this case regardless of whether Missouri actively supervised Kansas City's implementation of Ordinance 53539.[15] Therefore, the district court's finding that the state action doctrine exempts defendants Kansas City, MAST, Stout, and Fourth Party, Inc., from Sherman Act liability is affirmed.[16]

IV.

CONSTITUTIONAL CLAIMS

Counts IV and V of the plaintiffs' complaint allege various violations of their rights to substantive due process, procedural due process, and equal protection. The district court granted summary judgment in favor of all defendants on these claims.[17]

[5] The plaintiffs allege that they have been denied substantive due process because Kansas City's ambulance system deprives them of the freedom to contract with potential customers and freedom to engage in a lawful business. The district court rejected these contentions,

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15. In any event, the district court's finding that adequate state supervision of Kansas City's ambulance system existed here was not clearly erroneous.

16. Because we hold that the state action doctrine shields these defendants from antitrust liability, we need not address the issue of whether the plaintiffs' Sherman Act claims against them are barred by the tenth amendment to the United States Constitution.

17. The plaintiffs do not appeal from the district court's finding that they were not denied equal protection under the fourteenth amendment.

holding that a rational basis existed for Ordinance 53539. We affirm this holding.

[6] We agree with the court below that the challenged ordinance is designed to promote the public health, safety and welfare; and that it does not infringe on any fundamental constitutional right. There is no absolute right to contract free of state regulation under the police power. *See, e.g., New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96, 106-107, 99 S.Ct. 403, 410-411, 58 L.Ed.2d 361 (1978).

[7] Because the challenged ordinance does not involve a fundamental right or suspect class, the defendants need only demonstrate that the ordinance is designed to accomplish an objective within the government's police power, and that a rational relationship existed between the ordinance's provisions and its purpose. *See Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 813-814, 96 S.Ct. 2488, 2499-2500, 49 L.Ed.2d 220 (1976). The ordinance "need not be drawn so as to fit with precision the legitimate purposes" underlying it. *Id.*

The court below found that Ordinance 53539 satisfied the rational basis test. It stated:

> The Kansas City ordinance challenged by plaintiffs meets the "rational relationship" standard. Kansas City's stated purpose in passing this ordinance was to protect public health and safety by improving Kansas City's ambulance service. Kansas City officials were concerned that competition in the ambulance service industry was harming the public. Setting up the monopoly public utility model, in which the receipt of payment for ambulance service is not based on a company's ability to compete for business, is a reasonable means of improving service. Kansas

City's ordinance is not arbitrary or capricious; it is reasonably related to the purpose it seeks to achieve.

533 F.Supp. at 970-971.

After carefully reviewing the record and briefs, and hearing oral argument, we find no error in this conclusion. It therefore is affirmed.

[8] The plaintiffs also contend that the citizens of the Kansas City metropolitan area have been deprived of their right to select the ambulance company to provide service to them. The district court found that the plaintiffs lacked standing to assert this claim. We agree.

A litigant "may not claim standing * * * to vindicate the constitutional rights of some third party." *Barrows v. Jackson,* 346 U.S. 249, 255, 73 S.Ct. 1031, 1034, 97 L.Ed. 1586 (1953). The plaintiffs acknowledge this general rule, but they claim that they have standing under the exception recognized in *Singleton v. Wulff,* 428 U.S. 106, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976).

In *Singleton,* the Supreme Court held that a physician had standing to assert the rights of women patients to be free from governmental interference with their decision concerning abortion. *Id.* at 118, 96 S.Ct. at 2876. In so holding, the Court emphasized two factors: (1) the relationship of the litigant to the persons whose rights the litigant seeks to further; and (2) the ability of the third parties to assert their own rights. *Id.* at 114-116, 96 S.Ct. at 2874-2875.

In this case, the plaintiffs would not be effective proponents of the rights of the citizens of Kansas City. There is no close, confidential relationship between the plaintiffs and Kansas City residents. Moreover, the interests of the two are in substantial conflict. Gold Cross

and Transfer are principally interested in operating their businesses profitably, while Kansas City-area residents are principally concerned with receiving high quality ambulance service at the lowest possible cost. *Cf. Singleton v. Wulff, supra,* 428 U.S. at 113-117, 96 S.Ct. at 2873-2875.

In addition, the factors in *Singleton* that made it difficult for the third parties to assert their rights are not present here. Unlike the abortion decision in *Singleton*, the right in question here does not involve an intimate, private decision, nor is it affected by concerns of imminent mootness. *Cf. id.* at 113-117, 96 S.Ct. at 2873-2875. Accordingly, we agree with the district court that the plaintiffs lacked standing to assert any rights possessed by the citizens of the Kansas City area.

Finally, the plaintiffs allege that their procedural due process rights were violated because Kansas City issued its exclusive ambulance license to ASI and renewed that license without following the requirements of its ordinances and without giving the plaintiffs notice and an opportunity to be heard. The court below held that the plaintiffs were not entitled to any procedural due process because they possessed no protected property or liberty interest.

[9, 10] To sustain their procedural due process claim, the plaintiffs must first establish that they possessed "a legitimate claim of entitlement" to the ambulance license issued by Kansas City. *Board of Regents v. Roth,* 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). The plaintiffs could demonstrate such a claim of entitlement by showing that they had a reasonable expectancy of receiving the municipal license based upon state or local statutes or regulations, or upon an express contract or mutual understanding with the defendants. *See id.* at

577-578, 92 S.Ct. at 2709-2710; *Perry v. Sindermann*, 408 U.S. 593, 600-603, 92 S.Ct. 2694, 2699-2700, 33 L.Ed.2d 570 (1972); *Brockell v. Norton*, 688 F.2d 588, 590-591 (8th Cir.1982). Gold Cross and Transfer, however, have pointed to nothing which gives them a legitimate claim of entitlement to the Kansas City ambulance license.[18] Their unilateral expectation of being awarded a license is insufficient to sustain their procedural due process claim. *Board of Regents v. Roth, supra*, 408 U.S. at 577, 92 S.Ct. at 2709. Thus, the district court's grant of summary judgment against that claim is affirmed.

V.

CONCLUSION

We hold that the district court did not err in granting summary judgment in favor of defendants Kansas City, MAST, Jack Stout, and Fourth Party, Inc., on the plaintiffs' antitrust claims and in favor of all defendants on the plaintiffs' constitutional claims. Accordingly, that judgment is affirmed.

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18. To the extent that the district court's opinion suggests that a legitimate claim of entitlement can never arise from the procedures established in the statutes or regulations adopted by a state or its subdivisions, we disagree. *See, e.g., Wilson v. Robinson*, 668 F.2d 380, 382-383 (8th Cir.1981) (county ordinance requiring two weeks notice prior to the termination of nonprobationary sheriff's deputies creates a property interest protectible under the fourteenth amendment). We hold only that in this case, Gold Cross and Transfer have failed to demonstrate that there are any Missouri or Kansas City statutes or regulations, or alternatively any agreement between the various parties, which gave the plaintiffs a legitimate claim of entitlement to a municipal ambulance license.

APPENDIX B

GOLD CROSS AMBULANCE, et al.,
Plaintiffs,

v.

CITY OF KANSAS CITY, et al.,
Defendants.

No. 80-1131-CV-W-7.

United States District Court,

W. D. Missouri, W. D.

May 7, 1982.

Two privately-run ambulance services brought suit alleging state antitrust law violations and section 1983 claims arising out of city's creation of ambulance service system in which only one ambulance company was allowed to operate in city. Action was initiated in state courts and removed to federal court by trust established by city to oversee provision of ambulance services. Plaintiffs later amended their complaint to include Sherman Act claims, and all defendants subsequently moved to dismiss amended complaints. The District Court, John R. Gibson, Circuit Judge, sitting by designation, held that: (1) city, in passing ordinance employing single ambulance service company to provide ambulance service within city, was protected by state action exemption to antitrust laws; (2) city's actions were protected by Tenth Amendment as well; (3) if owners of ambulance companies did more than attempt to influence actions of city council, by combining their companies into one in order to foreclose competition in ambulance service industry in city, such action was not exempt from federal antitrust laws under *Noerr* doctrine; (4) consultant and his company shared state action and

Tenth Amendment exemption of city and trust; (5) ordinance did not violate due process clause; (6) plaintiffs had no standing to assert rights of citizens of city; (7) fact that city failed to follow its own rules in issuing license did not create procedural due process right in plaintiffs; and (8) plaintiffs' equal protection rights were not violated.

Order accordingly.

1. Monopolies (Key) 12(16)

City, in creating system in which only one ambulance company was allowed to operate ambulance service in city, was protected by state action exemption to antitrust laws, where state had enacted comprehensive system for licensing and regulating ambulance companies and there was active supervision, both by state itself and by city, of the anticompetitive regulation. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1; V.A.M.S. §§ 67.300, 190.100-190.195.

2. Monopolies (Key) 12(15.5)

State action exemption to antitrust laws requires that state actively supervise enforcement of anticompetitive regulation.

3. Monopolies (Key) 12(16)

Any actions taken by trust, which city established city to oversee provision of ambulance services, to induce other municipalities to enact public utility model for ambulance service were exempt from antitrust laws under *Noerr* doctrine. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; U.S.C.A.Const.Amend. 1.

4. Constitutional Law (Key) 81

Exercise of police power for general public welfare is right reversed to states and their subdivisions by Tenth Amendment. U.S.C.A.Const.Amend. 10.

5. States (Key) 4.16

Federal antitrust laws, as applied to state's and city's ambulance service regulations creating ambulance service system in which only one ambulance company was allowed to operate in city, would interfere with state and local governments' regulation of their own affairs, thereby violating Tenth Amendment. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; U.S.C.A.Const.Amend. 10.

6. Monopolies (Key) 28(1.7)

Even if city's action of creating ambulance service system in which only one ambulance company was allowed to operate in city was not permitted by state action exemption and Tenth Amendment, city would not be liable in damages to privately-run ambulance companies, where city made no profit from its ambulance service system, and in fact expended t[illegible] money to subsidize system. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; U.S.C.A. Const.Amend. 10.

7. Monopolies (Key) 12(16.5)

Attempts by owners of ambulance companies to induce city to institute public utility model for ambulance service did not violate Sherman Act, since such actions amounted to nothing more than exercise of their First Amendment rights to attempt to change government policy, and fact that some of them may have been acting to further their own economic interests at expense of their competitors was immaterial, as long as they were ligitimately attempting to change governmental policy. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; U.S.C.A. Const.Amend. 1.

8. Monopolies (Key) 12(16.5)

First Amendment activities are exempt from federal antitrust laws. U.S.C.A.Const.Amend. 1.

9. Monopolies (Key) 12(16.5)

If owners of ambulance companies did more than attempt to influence actions of city council, and combined their companies into one in order to foreclose competition in ambulance service industry in city, such action was not exempt from federal antitrust laws under Noerr doctrine. Sherman Anti-Trust Act. § 1, 15 U.S.C.A. § 1; U.S.C.A. Const.Amend. 1.

10. Monopolies (Key) 12(16)

States (Key) 4.17

Absent allegation that consultant and his company did anything other than what city and trust established by city to oversee provision of ambulance services authorized them to do, consultants and his company shared state action and Tenth Amendment exemption of city and trust against allegation that such defendants conspired to restrain trade by creating ambulance service system in which only one ambulance company was allowed to operate in city. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; U.S.C.A.Const.Amend. 10.

11. Monopolies (Key) 10

Missouri Anti-Trust Statutes are to be interpreted in accordance with federal antitrust laws. V.A.M.S. § 416.031 et seq.

12. Constitutional Law (Key) 287.2(1)

There is no substantive due process right to engage in particular business. U.S.C.A.Const.Amend. 14.

13. Automobiles (Key) 61

City was free to regulate ambulance companies in public interest, even if regulations had effect of preventing privately-run ambulance companies from conducting their business in city. U.S.C.A.Const.Amend. 14.

14. Constitutional Law (Key) 252.5

Ordinance which did not infringe on any fundamental right, such as right to privacy or right to vote, need not have been strictly scrutinized by court considering substantive due process challenge. U.S.C.A.Const.Amend. 14.

15. Constitutional Law (Key) 81

Economic regulations need not be perfectly drawn in order to be constitutional; as long as challenged law is passed in proper exercise of government's police power, only requirement is that its provisions bear some rational relationship to purpose that law seeks to achieve. U.S.C.A. Const.Amend. 14.

16. Constitutional Law (Key) 287.2(1)

Ordinance creating ambulance service system in which only one ambulance company was allowed to operate in city did not violate due process clause, since setting up monopoly public utility model, in which receipt of payment for ambulance service was not based on company's ability to compete for business, was reasonable means of improving service. U.S.C.A.Const.Amend. 14.

17. Constitutional Law (Key) 42.1(6)

Privately-run ambulance companies had no standing to assert rights of citizens who companies complained had been denied their right to choose ambulance company they wished to have serve them, by city's enactment of ambulance creating ambulance service system in which only one ambulance company was allowed to operate in city. U.S.C.A.Const.Amend. 14.

18. Constitutional Law (Key) 42(1)

Generally, litigant may not claim standing to vindicate Constitutional rights of some third party.

19. Constitutional Law (Key) 277(1)

To have property interest in a benefit, person must have more than abstract need or desire for it, or unilateral expectation of it; he must, instead, have legitimate claim of entitlement to it. U.S.C.A.Const.Amend. 14.

20. Constitutional Law (Key) 277(1), 287.2(1)

Privately-run ambulance companies had no liberty or property interest in ambulance license granted by city, as would have entitled companies to procedural due process. U.S.C.A.Const.Amend. 14.

21. Constitutional Law (Key) 287.2(1)

Even assuming that city violated its own ordinances and acted illegally in issuing sole city ambulance service license to defendant corporation, city's actions did not give rise to procedural due process claim on part of plaintiffs which were privately-run ambulance companies. U.S.C.A. Const.Amend. 14.

22. Constitutional Law (Key) 213.1(1)

If challenged law makes classification based on "suspect criteria" such as race or national origin, courts will strictly scrutinize the law. U.S.C.A.Const.Amend. 14.

23. Constitutional Law (Key) 213.1(2)

As to economic measures, court will apply only "rational relationship" test, that is, if classification bears rational relationship to purpose of law, then there is no violation of equal protection. U.S.C.A.Const.Amend. 14.

24. Constitutional Law (Key) 211(2)

Statutory classification impinging upon no fundamental interest, and especially one dealing only with eco-

nomic matters, need not be drawn so as to fit with precision the legitimate purposes animating it. U.S.C.A. Const.Amend. 14.

25. Constitutional Law (Key) 230.2

City did not violate privately-run ambulance companies' equal protection rights by granting sole city ambulance service license to another corporation based on its belief that plaintiff companies could not provide scope of ambulance service which city needed, and even if city employed "dual standards" in granting license, plaintiff companies alleged nothing which would tend to show that standards used were not rationally related to city's purpose of improving ambulance service. U.S.C.A.Const. Amend. 14.

26. Constitutional Law (Key) 230.2

Privately-run ambulance companies' allegations that city was seeking to compel them to obey its ambulance service ordinance while not so compelling corporation to which city issued sole city ambulance service license could not form basis of equal protection claim, where defendant corporation, unlike plaintiff companies, had license to operate and city's choice to enforce its ordinance against plaintiff companies was not based on any impermissible ground. U.S.C.A.Const.Amend. 14.

27. Constitutional Law (Key) 211(3)

In order to make out case for discriminatory enforcement, plaintiffs must show that they have been singled out and compelled to comply with law while other similarly situated have not been so compelled; and that government's singling out of plaintiffs was based upon impermissible ground such as race, religion or plaintiffs' exercise of their First Amendment rights. U.S.C.A.Const.Amends. 1, 14.

C. Robert Buckley, Independence, Mo., for plaintiffs.

George E. Leonard, Shughart, Thomson & Kilroy, Kansas City, Mo., for defendants MAST, 4th Party, Inc., and Jack Stout.

Steven E. Wermcrantz, Linde, Thomsom, Fairchild, Langworthy, Kohn & Van Dyke, Kansas City, Mo., for defendants Hadley Reimal, Lawrence Hughes, June and Eugene DeSaulniers.

Wm. D. Geary, Asst. City Atty., Kansas City, Mo., for defendant City of Kansas City.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTIONS TO DISMISS, WHICH ARE BEING TREATED AS MOTIONS FOR SUMMARY JUDGMENT

JOHN R. GIBSON, Circuit Judge, sitting by designation.

Plaintiffs Gold Cross Ambulance (Gold Cross) and Transfer & Standby Services, Inc. (Transfer), two privately-run ambulance companies operating out of Independence, Missouri, bring this five-count complaint against multiple defendants. Count I alleges a violation of Section 1 of the Sherman Act. Plaintiffs contend that defendants Lawrence Hughes, Hadley Reimal, June DeSaulniers and Eugene DeSaulniers consolidated their previously separate ambulance companies into a single corporation, Ambulance Services, Inc.,[1] (ASI), for the purpose of restraining trade. Plaintiffs further allege that these defendants, along with defendant Jack Stout and Stout's company, Fourth Party, Inc., conspired with officials of defendant City of Kansas City and Metropolitan Ambulance Services Trust (MAST),

1. Formerly called Ambulance Service of Clay County, Inc.

a trust established by the City to oversee the provision of ambulance services, to restrain trade by creating an ambulance service system in which only one ambulance company is allowed to operate in the City.

Count II alleges that defendants have violated Section 2 of the Sherman Act by taking action to monopolize the ambulance service industry in Kansas City. Plaintiffs further allege that defendant MAST has encouraged other municipalities to enact the same type of ambulance service system which Kansas City operates.

Count III alleges violations of the Missouri antitrust statutes, Mo.Rev.Stat. § 416.031 *et seq.*, which outlaw conspiracies in restraint of trade and conduct taken in an attempt to further a monopoly.

Count IV is a 42 U.S.C. § 1983 claim in which plaintiffs allege that they have been deprived of their substantive due process, procedural due process, and equal protection rights. Plaintiffs also allege that defendants have deprived the citizens of Kansas City of their right to choose which ambulance companies they wish to have serve them.

Count V, which is brought directly under the Fourteenth Amendment to the United States Constitution, alleges that defendants have deprived plaintiffs of their due process rights. Plaintiffs also reiterate their claim that defendants are violating the right of Kansas Citians to choose their ambulance company.

Plaintiffs originally filed their case in Missouri state court, alleging only Missouri antitrust law violations and § 1983 claims. Defendant MAST removed to federal court and filed a counterclaim alleging that plaintiffs had violated the federal antitrust laws. MAST then moved for a preliminary injunction against plaintiffs; this motion was

denied by Judge Scott O. Wright after a three-day hearing during which numerous witnesses testified regarding the nature of the ambulance service industry and the history of Kansas City's enactment of a one-company system. Plaintiffs later amended their complaint to include Sherman Act claims, and all defendants subsequently moved to dismiss the amended complaint. These motions to dismiss are now before the Court.[2]

I. *Statement of Facts*

Ambulance service in Kansas City has had a varied history. Some years ago the City operated a municipal ambulance service. In more recent times, however, several separate, privately-run ambulance companies operated in the area. Among these companies were plaintiffs Gold Cross and Transfer, as well as separate companies run by defendants Hughes, Reimal and the DeSaulniers.

In the late 1970's Kansas City officials became concerned about the quality of Kansas City's ambulance service. They were particularly concerned about the private ambulance companies' slow response to emergency calls. The City formed a Public Safety Improvement Committee to look into the problem, and the Committee reported its findings to the City Council on March 20, 1979. On March 30, 1979 the City Council adopted a resolution expressing its intent to improve ambulance service within the City and committing itself to provide emergency ambulance

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2. Pursuant to Rule 12(b)(6), Fed.R.Civ.P., these motions are being treated as motions for summary judgment rather than as motions to dismiss since matters outside the pleadings have been presented to the Court. In ruling on these motions the Court has considered the pleadings, briefs and exhibits filed in this case, along with the transcript of a preliminary injunction hearing held before Judge Scott O. Wright on March 13, 16 and 17, 1981. The Court has also considered the provisions of the applicable state laws and Kansas City ordinances.

service by a single operating entity. The City also hired a consultant, Jack Stout, to study the feasibility of implementing a single-company system in Kansas City. Mr. Stout has developed what is called the "public utility model" for ambulance service in which numerous, competing ambulance companies are replaced by a single-company system. The public utility model is intended to deal with the major problems inherent in the free-market system.

Emergency ambulance service requires expensive advanced life support equipment. Ambulance companies have little or no control over emergency service costs, and they have difficulty collecting their fees for emergency work. Non-emergency calls are far more profitable since the service is less expensive to provide and the company is more likely to be paid for its work.[3] Ambulance companies operating in an unregulated market thus tend to concentrate on answering non-emergency calls rather than on providing quick, high quality emergency care.

The public utility model seeks to remedy this problem by employing a single ambulance service company and making the company's profitability to its owners contingent on the quality of the service it provides rather than on its ability to collect its bills. Under the public utility model the ambulance company contracts with the City to provide a certain level of medical care and to meet certain response time standards. The ambulance company has a strong incentive to answer each service call quickly and efficiently since the City pays the company in accordance with its ability to meet the contractual standards. If the

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3. These and other issues concerning ambulance service were developed in detail in the March, 1981, hearing on MAST's request for a preliminary injunction against Gold Cross and Transfer. These issues are discussed in Judge Scott O. Wright's April 7, 1981, order denying the preliminary injunction.

ambulance company fulfills the crucial contract requirements, it will receive its contracted-for payment regardless of whether the City has been able to collect for the services rendered by the company. If the fees collected by the City do not cover the amount owed to the ambulance company, the City makes up the difference by way of government subsidy. Under the public utility model the City also owns all the ambulance service equipment, thus minimizing the danger that service will be interrupted by any financial problems which the ambulance service company may experience.

For the public utility model to be economically feasible it is necessary that the municipally licensed company be the only ambulance service allowed to do business in the City. If other, privately-run companies are allowed to operate freely, they will "skim the cream" by taking virtually all the high profit, non-emergency calls and leaving the emergency business to the municipal system.

In November, 1979, the Kansas City Council enacted an ambulance service ordinance incorporating the major aspects of the public utility model.[4] The first ambulance service contract was given to ASI, the corporation which had been formed by the merger of the ambulance companies run by defendants Hughes, Reimal and the DeSaulniers. The ordinance as enacted requires that there be a competitive bidding process to determine which company will be awarded the city license. However, no competitive bidding procedure was held before the first license

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4. For the first two years that the ordinance was in effect, ASI continued to own its ambulance equipment. In September, 1981, this ambulance equipment was sold to MAST, as contemplated by the public utility model. When Kansas City's current ambulance service contract with ASI expires, a new contract will be given to the company which successfully bids for it, and this company will simply provide the personnel and services necessary to operate the MAST-owned equipment.

was granted because, according to the statements of defendant Kansas City, ASI was the only state-licensed company in the area which could possibly provide ambulance services on the scale necessary to make the single-provider concept work.

Kansas City concedes that, by granting the sole city license to ASI, it has closed other companies out of a major part of the Kansas City ambulance service market. Companies such as Gold Cross and Transfer can bring patients to Kansas City hospitals if they pick them up outside Kansas City city limits. They can also travel through Kansas City on their way to other areas. However, they cannot pick up patients within the city limits. Clearly, this greatly limits plaintiffs' ability to do business in the Kansas City area. Plaintiffs state that they have had to turn down several large non-emergency service contracts because of Kansas City's refusal to grant them a license.

This case presents a number of close and complex issues. We deal first with the federal antitrust claims brought against defendants Kansas City and MAST. The most important issues involve the State Action Exemption to the antitrust laws and the Tenth Amendment.

II. *State Action Exemption*

Kansas City argues that the restraints it has placed on the ambulance service industry are permissible under the state action exemption to the antitrust laws.

The state action exemption allows governmental bodies to engage in anticompetitive activities which would amount to antitrust violations if engaged in by private parties. Over the years this exemption has come to apply to cases where the state itself has directed or authorized anticompe-

titive practices in a "clearly articulated and affirmatively expressed" manner, and where the state actively supervises the enforcement of the anticompetitive regulations.

In analyzing Kansas City's ambulance service system to determine whether it meets the state action exemption, it is necessary to examine carefully the development of the exemption. An understanding of both the factual background and the legal reasoning of the major state action exemption cases is therefore extremely important.

A. *Origin and Development of the State Action Exemption*

The state action exemption was first recognized in *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). In *Parker*, the Supreme Court held that a California law designed to decrease competition among raisin growers and to provide price supports for raisins was not a violation of the Sherman Act because the antitrust laws were not meant to cover the actions of a state itself. The Court stated, "The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state." 317 U.S. at 350, 63 S.Ct. at 313, 87 L.Ed. at 326. The Court went on to state, "The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit." *Id.*, 317 U.S. at 352, 63 S.Ct. at 314, 87 L.Ed.2d at 327.

The state action exemption of *Parker* remained substantially unchanged until the 1970's, when the court ruled on a series of cases invoking the exemption. The first of

these was *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975). The plaintiffs in *Goldfarb* challenged a Virginia bar association minimum fee schedule, claiming that it was an illegal price-fixing scheme. The Court found that neither the Virginia Supreme Court nor any other arm of the state attempted to enforce the minimum fee schedule; the Virginia Supreme Court's ethical code simply mentioned advisory fee schedules without requiring them. In holding that the minimum fee policy was a violation of antitrust laws, the Supreme Court stated, "It is not enough that . . . anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign." 421 U.S. at 790, 95 S.Ct. at 2015, 44 L.Ed.2d at 587.

The Supreme Court again refused to apply the state action exemption in *Cantor v. Detroit Edison Company,* 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976), which involved defendant Detroit Edison Company's policy of distributing free light bulbs to its customers. Plaintiff charged that Detroit Edison was using its monopoly power as a supplier of electricity to reduce competition in the sale of light bulbs. Detroit Edison had begun its light bulb distribution program in the early days of its operation and the program was already in effect at the time of the creation of the Michigan Public Service Commission, the agency which regulated Detroit Edison. The Public Service Commission never specifically approved or disapproved of Detroit Edison's light bulb policy. However, Detroit Edison was not free to change its program without filing a new tariff with the Commission and making an adjustment in its rates. Detroit Edison argued that the Commission's tacit approval of the plan and its requirement that Detroit Edison file a tariff before eliminating it

constituted "state action" sufficient to exempt Detroit Edison from the antitrust laws. The Court ruled that a state cannot confer immunity from antitrust laws merely by approving a private company's proposed trade restraint policy and then ordering the company to comply with the policy. The Court stated, "[S]uch a rule may give a host of state regulatory agencies broad power to grant exemptions from an important federal law for reasons wholly unrelated either to federal policy or even to any necessary significant state interest." 428 U.S. at 602, 96 S.Ct. at 3123, 49 L.Ed.2d at 1157.

A year later in *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977), the Court held that an Arizona Supreme Court disciplinary rule which prohibited lawyer advertising did not violate the antitrust laws. The Arizona disciplinary rule on advertising was an affirmative commend of the State Supreme Court; it was not merely an acquiescence to the policies of a state or local association as had been the case in *Goldfarb*. In addition, the party enforcing the rule was the Arizona Supreme Court itself rather than the state bar association. The bar association acted merely "as the agent of the court under its continuous supervision." 433 U.S. at 360, 97 S.Ct. at 2697, 53 L.Ed.2d at 822. The need to protect the public from unfair or misleading legal advertising was an important state interest; this was different from the situation in *Cantor*, where the light bulb distribution program did not arise from any percieved need to protect the public interest. The Supreme Court summed up its holding on the antitrust issues in *Bates* by stating, "[W]e deem it significant that the state policy is so clearly and affirmatively expressed and that the State's supervision is so active." *Id.*

B. *The State Action Exemption as Applied to Municipalities*

Two recent state action exemption cases have involved anticompetitive actions taken by municipalities. In *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 98 S.Ct. 1123, 55 L.Ed.2d 364 (1978), the petitioner cities operated electric companies, providing electricity both within and without their city limits. They engaged in a business activity and realized a profit. In defense of a Sherman Act counterclaim brought by the electric utility with which they competed, the cities claimed that their actions were exempt from the antitrust laws under the *Parker* doctrine. The Supreme Court noted, however, that there is a "presumption against implied exclusions from coverage under the antitrust laws," 435 U.S. at 398, 98 S.Ct. at 1129, 55 L.Ed.2d at 373, and stated that the cities' claims to an exemption could not succeed unless the cities could "demonstrate that there are countervailing policies which are sufficiently weighty to overcome the presumption" against an exemption. *Id.* at 400, 98 S.Ct. at 1130, 55 L.Ed.2d at 375. After considering defendants' arguments at length, the Court concluded that cities are not necessarily exempt from the antitrust laws merely because of their status as governmental bodies. The Court recognized, however, that the actions of municipalities may reflect state policy, and concluded that "the Parker doctrine exempts . . . anticompetitive conduct engaged in as an act of government by the States as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service." *Id.* at 413, 98 S.St. at 1137, 55 L.Ed.2d at 383. In explaining the intent of its holding, the Court stated:

> This does not mean, however, that a political subdivision necessarily must be able to point to a specific,

> detailed legislative authorization before it properly may assert a Parker defense to an antitrust suit. . . . [A]n adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is found "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of."

Id. at 415, 98 S.Ct. at 1138, 55 L.Ed.2d at 384. The Court went on to explain that its decision "does not threaten the legitimate exercise of governmental power, nor does it preclude municipal government from providing services on a monopoly basis." *Id.* at 415, 98 S.Ct. at 1138, 55 L.Ed.2d at 385. In conclusion the Court stated,

> [A]ssuming that the municipality is authorized to provide a service on a monopoly basis, [the limitations expressed in the *Lafayette* case] will not hobble the execution of legitimate governmental programs.

Id. at 418, 98 S.Ct. at 1139, 55 L.Ed.2d at 385.

In the more recent case of *Community Communications Company, Inc. v. City of Boulder*, ... U.S. ....., 102 S.Ct. 835, 70 L.Ed.2d 810 (1982), the Supreme Court held that the state action exemption did not apply in cases where a state simply granted broad "home rule" power to a municipality. Respondent City of Boulder was a home rule city which had the right of self-government in municipal matters. Petitioner, a cable television company operating in Boulder, challenged a Boulder ordinance which prohibited petitioner from expanding its business for a three-month period, contending that the ordinance constituted a restraint of trade under the Sherman Act.

In an opinion written by Justice Brennan, the Supreme Court found that the requirement of "clear articulation

and affirmative expression" is not satisfied when the state's position is "one of mere *neutrality* respecting the municipal actions challenged as anticompetitive." ..... U.S. at ....., 102 St.Ct. at 842, 70 L.Ed.2d at 821. (Emphasis in original.) The Court stated, "A State that allows its municipalities to do as they please can hardly be said to have 'contemplated' the specific anticompetitive actions for which municipal liability is sought." *Id.* The Court noted, "'Under these circumstances there is no interaction of state and local regulation. We have only the action or exercise of authority by the City.'" *Id.*

The Court concluded that each home rule city was free to choose a different method of regulating cable television since no one system was contemplated by the state. The state could not be found to have clearly articulated and affirmatively expressed a policy to regulate cable television in the way Boulder had chosen, and Boulder's regulations were therefore not exempt from the antitrust laws under the *Parker* doctrine.

C. *Application of the State Action Exemption to this Case*

With the above-discussed state action exemption cases in mind, we look to the particular facts presented in this case to determine whether Kansas City has met the requirements of the exemption.

Missouri's authorization of municipally-run ambulance systems is set forth in Section 67.300, Mo.Rev.Stat., which provides:

> 1. Any county, city, town or village may provide a general ambulance service for the purpose of transporting sick or injured persons to a hospital, clinic, sanatorium or other place for treatment of the illness or injury, and for that purpose may

(1) Acquire by gift or purchase one or more motor vehicles suitable for such purpose and may supply and equip the same with such materials and facilities as are necessary for emergency treatment, and may operate, maintain, repair and replace such vehicles, supplies and equipment;

(2) Contract with one or more individuals, municipalities, counties, associations or other organizations for the operation, maintenance and repair of such vehicles and for the furnishing of emergency treatment;

(3) Employ any combination of the methods authorized in subdivisions (1) and (2) of this section.

2. The municipality or county shall formulate rules and regulations for the use of the equipment and may fix a schedule of fees or charges to be paid by persons requesting the use of the facilities and provide for the collection thereof.

* * *

Other regulations regarding the provision of ambulance service are contained in Chapter 190 of the Revised Statutes of Missouri. Section 190.105.1 requires all ambulance operators to be licensed by the State of Missouri, and Section 190.125 requires an annual showing of need for each state ambulance license issued. Sections 190.115 and 190.120 set out the equipment and the kind of insurance coverage which each licensed ambulance must have. Section 190.145 lists the qualifications which amublance service personnel must meet, and section 190.175 details the records which each ambulance license holder is required to maintain.

The State of Missouri clearly contemplated that municipalities may wish to impose their own restrictions on ambulance service, in addition to those imposed by the

State. Section 190.105.4 provides that issuance of a state license shall not be construed to authorize operation of an ambulance "without a franchise in any county, municipality or political subdivision which has enacted an ordinance making it unlawful to do so." Section 190.105.5 provides that municipalities are not precluded from adopting ambulance service ordinances which are not in conflict with state law.

Pursuant to the above statutes, the Kansas City Council chose to enact a public utility model ambulance service ordinance. The Council's March 30, 1979 resolution set forth the Council's intent to pass this ordinance and contained the following language:

> BE IT RESOLVED BY THE CITY OF KANSAS CITY:
>
> That emergency ambulance service can be best provided to the City by a single operating entity, contracted with by the Health Department.

The ordinance which the Kansas City Council passed subsequent to its resolution (Ordinance No. 53539, adopted in November, 1979),[5] regulates ambulance service in detail. The ordinance establishes an Emergency Physicians Advisory Board which appoints an ambulance service Medical Director and makes recommendations for the improvement of ambulance service. In addition, the ordinance gives the City's Director of Health authority to promulgate the rules, regulations and standards necessary to implement the public utility system. Pursuant to this authority, the Director of Health establishes standards for clinical performance, patient care, response time and medical protocols, and sets forth procedures for medical control

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5. Amended December, 1981.

over the delivery of advanced life support by ambulance personnel. The ordinance also requires all ambulance drivers, attendants, and dispatchers to obtain permits from the Director of Health.

[1] In analyzing the validity of Kansas City's ambulance service ordinance, we are fully aware that the development of the state action exemption has involved many close decisions from the Supreme Court, including a plurality decision in *Lafayette* and a 5-3 decision in *Community Communications*. The state action exemption still involves many unanswered questions, and the cases interpreting the exemption are not entirely consistent. However, having carefully reviewed the state action exemption cases decided thus far, we are convinced that under the facts presented in this case Kansas City may properly invoke the state action exemption to the antitrust laws.

Missouri has not merely acquiesced in essentially private anticompetitive activity, as was the case in *Goldfarb* and *Cantor*. Rather, the State of Missouri has chosen to enact a comprehensive system for licensing and regulating ambulance companies. Since the regulation of ambulance service is a legitimate exercise of government authority in an area where there is an obvious need to protect the public safety and health, the case at bar is further distinguishable from *Cantor*, where the Court concluded that the defendant's actions were not motivated by any recognizable state interest.

Unlike the municipalities in *Lafayette*, Kansas City is not seeking to increase its revenues at the expense of private enterprise. In passing its ambulance ordinance, the City was motivated by a wish to improve ambulance service. The City wanted to insure that quick and efficient emergency service would be available to all its citizens, and it was willing to subsidize the service if

necessary. There has been no showing that with such a policy the City will derive economic benefit from establishment of a single provider ambulance system.

This case is also distinguishable from the latest state action exemption case, *Community Communications*. Missouri has many statutes dealing with the provision of ambulance service. This is totally unlike the grant of blanket "home rule" power at issue in *Community Communications*. In sections 67.300 and 190.100-190.195 Missouri has announced a state policy to regulate the ambulance industry. These statutes clearly articulate and affirmatively express the state's policy to place anticompetitive restraints on ambulance service. Section 190.125 in particular, which requires a showing of necessity for each ambulance license granted, clearly indicates an intent to regulate the provision of ambulance service on the basis of public need rather than to allow unbridled competition. As the Missouri Supreme Court has found, the thrust of Chapter 190 is "toward control of destructive competition and improvement of [ambulance] service." *City of Raytown v. Danforth*, 560 S.W.2d 846, 849 (Mo. en banc 1978). When the several statutes adopted by Missouri are examined, it is apparent that there has been, in the words of *Lafayette*, "an adequate state mandate for anticompetitive activities." Missouri has given authority for a "governmental entity to operate in a particular area and the legislature contemplated the kind of action complained of" by plaintiffs.

To satisfy the *Lafayette* requirement such specific detailed legislative authorization is not required, but its existence points clearly to the "authorization or direction" contemplated in *Lafayette*. Sections 67.300 and 190.100-195 contain the clear articulation and affirmative expression of the state policy that cities may operate ambulance services in their respective localities.

The principles of *Lafayette* are in no way weakened by the *Community Communications* case, which recognizes that the state action exemption applies where there is "municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy." 102 S.Ct. at 841, 70 L.Ed.2d at 819. In *Community Communications* the Court simply found that there was city action in the absence of any expression of state policy; there was no interaction of state and local regulation. Here, the State of Missouri has spoken clearly on the subject of regulation of ambulance service, and it recognizes the role the city is to play in providing the service by granting franchises, contracting with ambulance service providers and issuing regulations. There is no question about interaction of state and local regulation in the ambulance field, as demonstrated by the statutes of the State of Missouri and ordinances of the City of Kansas City. The reasoning and analysis contained in *Community Communications* and *Lafayette* support the conclusions we have reached.

We recognize that by providing in section 67.300 that cities "may" contract with one or more ambulance service providers the state is allowing a municipality to choose for itself whether or not it wishes to enter into such a contract. This language, however, meets the requirement in *Lafayette* that the state may direct or *authorize* the municipalities to enter into anticompetitive methods of providing ambulance service. The action by the City in response to this authorization is the interaction between state and city recognized in *Community Communications.*

[2] The state action exemption also requires that the state actively supervise the enforcement of the anticompetitive regulation. *California Liquor Dealers v. Mid-Cal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980).

Adequate state supervision is present in this case. The State of Missouri licenses both vehicles and personnel. Sections 190.115, 190.125 and 190.135 authoriz a full investigation each time an ambulance license application is made. In addition, section 190.125 authorizes the state licensing officer to periodically inspect each ambulance when he deems it necessary. Section 190.140 regulates in detail the services which mobile emergency medical technicians may render. Under section 190.165, the licensing officer can revoke or suspend the license of any ambulance service provider who does not comply with the Chapter 190 regulations. Section 190.171 provides for an administrative hearing when such action is taken. Section 190.185 empowers the Missouri State Board of Health to adopt, amend, promulgate and enforce necessary rules, regulations and standards with respect to ambulance service and ambulance personnel.

Section 67.300, Mo.Rev.Stat., also requires municipalities to formulate rules and regulations for the use of ambulance equipment. This affirmative requirement of the State of Missouri raises a question as to whether the regulation by the City itself satisfies the active supervision requirement as expressed in *Mid-Cal* and the other decisions. The plurality opinion of Justice Brennan in *Community Communications* did not reach the question of whether an ordinance "must or could satisfy the 'active state supervision'" test focused upon in *Mid-Cal*. ..... U.S. at ....., n.14 102 S.Ct. at 841, n.14, 70 L.Ed.2d at 819, n.14. Under the limited circumstances of this case, however, we are satisfied that the action of Kansas City in enforcing its ordinance through its Director of Health, Physicians Advisory Board, and Medical Advisor constitutes active state supervision since its regulation of ambulance service is exercised under the authorization and direction of state policy.

There is strong reason to so consider Kansas City's action. It performs this supervision for the purpose of insuring high quality ambulance service and short response time to the scene of emergency. This is governmental action motivated by concern for public health and safety and is active supervision in interaction with state authorization.

[3] We thus conclude that the actions of Kansas City were authorized by clearly articulated and affirmatively expressed state policy and that there is active state supervision, both by the state itself and by the City, of the anticompetitive regulation. This satisfies the requirements of the state action exemption. For these reasons, summary judgment must be granted for defendants Kansas City and MAST on plaintiffs' Sherman Act claims.[6]

III. *Tenth Amendment*

Although we have determined that Kansas City's actions are exempted by the *Parker* doctrine, we consider it important to discuss briefly Kansas City's second major argument in favor of the validity of its ambulance service ordinance. Kansas City contends that the federal antitrust laws, as applied to it, impermissibly intrude on its regulation of its own affairs, thereby violating the Tenth Amendment to the United States Constitution.

The state action exemption and the Tenth Amendment overlap to a certain extent. A defendant who seeks to invoke the state action exemption must meet a heavy

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6. In addition to challenging the validity of the Kansas City ordinance, plaintiffs also claim that defendant MAST has violated the antitrust laws by attempting to induce other municipalities to enact a public utility model for ambulance service. This claim does not merit lengthy discussions. Any such actions which MAST may have taken are clearly exempt from the antitrust laws under the Noerr doctrine, discussed *infra* at page 969.

burden. Once "clear articulation and affirmative expression" and "active state supervision" have been shown, the defendant has established that its actions are essentially the actions of the state itself. A finding that the defendant has met the requirements of the state action exemption should at least alert the Court that there are also Tenth Amendment rights involved.

[4] The ambulance service regulations at issue here were enacted to protect the health of the citizens of the State of Missouri and the City of Kansas City. As such, these regulations fall within the broad concept of "police power." *Kleid v. Board of Education of Fulton*, 406 F.Supp. 902 (W.D.Ky.1976). The exercise of the police power for the general public welfare is a right reserved to the states and their subdivisions by the Tenth Amendment. *Brown v. Brannon*, 399 F.Supp. 133, 147 (M.D.N.C.1975), *aff'd per curiam*, 535 F.2d 1249 (4th Cir. 1976).

This is largely an uncharted area of the law. However, two recent Supreme Court cases are helpful in analyzing defendants' Tenth Amendment argument. In *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976), the Supreme Court held unconstitutional amendments to the Fair Labor Standards Act which made the Act applicable to the wage and hour policies of state and local governments. The Court stated, "[I]nsofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Article I, § 8, cl. 3." 426 U.S. at 851, 96 S.Ct. at 2474, 49 L.Ed.2d at 257-58.

The broad language of *Usery* was narrowed substantially in *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981). The facts of Hodel are very different from the

case at bar. *Hodel* dealt with provisions of the Surface Mining Act. However, *Hodel* is important because it laid down three requirements which must be met before a violation of the Tenth Amendment is shown:

> First, there must be a showing that the challenged statute regulates the "States as States." (Cite omitted) Second, the federal regulation must address matters that are indisputably "attributes of state sovereignty." (Cite omitted) And third, it must be apparent that the State's compliance with federal law would directly impair their ability "to structure integral operations in areas of traditional functions."

Id. at 287, 101 S.Ct. at 2366, 69 L.Ed.2d at 23. The Court did not elaborate on these requirements and gave little indication of what was needed to meet them. The Court did state, however, that a statute would not violate the Tenth Amendment if it regulated only "'individuals and businesses necessarily subject to the dual sovereignty of the government of the Nation and the State in which they reside.'" *Id.* at 293, 101 S.Ct. at 2369, 69 L.Ed.2d at 26.

Neither *Usery* nor *Hodel* was an antitrust case. However, the concept of Tenth Amendment restraint on federal regulation can have applicability when the antitrust laws infringe on the police power of a state.[7]

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7. Recently the Fifth Circuit, in *Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories*, 656 F.2d 92 (5th Cir. 1981), *cert. granted*, ____ U.S. ____, 102 S.Ct. 1629, 71 L.Ed.2d 865 (1982), and the Sixth Circuit in *Hybud Equipment Corp. v. City of Akron, Ohio*, 654 F.2d 1187 (1981), *cert. granted, vacated and remanded*, ____ U.S. ____, 102 S.Ct. 1416, 71 L.Ed.2d 640 (1982), held that antitrust regulations could violate the Tenth Amendment when applied to state and local governments. Both *Jefferson City Pharmaceutical* and *Hybud* were decided within a few weeks of *Hodel*. *Hybud* did not cite *Hodel*, while *Jefferson*

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Although this is a close case, we believe that the requirements of *Hodel* are satisfied in this case.

[5, 6] In this instance the antitrust laws would prohibit the State of Missouri and the City of Kansas City from enacting ambulance service regulations which they feel are necessary to protect their citizens, and which they would otherwise have the right to enact under their general police power. In this sense the Court believes that the antitrust laws are attempting to regulate "states as states" and the "municipalities as municipalities."[8] The antitrust laws here do not merely affect "individuals and businesses necessarily subject to the dual sovereignty of the government of the Nation and the State in which they reside." Rather, they affect the State of Missouri and the City of Kansas City themselves. The regulation of ambulance service is a particular concern of state and local government, and the operation of ambulance service is an exercise of a city's governmental function. *Bailey v. City of St. Louis*, 578 S.W.2d 278 (Mo.App.1978).[9] Thus, anti-

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Footnote continued—

County Pharmaceutical cited it only in a footnote to the dissenting opinion. Both cases read *Usery* very broadly, without the qualifying language of *Hodel*, and *Hybud*, which involved state action exemption issues, has been vacated and remanded for reconsideration in light of *Community Communications*. These two cases therefore have limited value as precedent. However, they are significant because of their recognition that antitrust laws, like other federal regulations, can infringe on the sovereignty of state and local governments.

8. As the Supreme Court noted in *Usery* at footnote 20, the Tenth Amendment protects city and local governments as well as the states themselves. 426 U.S. at 856, 96 S.Ct. at 2476, 49 L.Ed.2d at 260.

9. The issue of what constitutes a state governmental function was discussed in the very recent case of *United Transportation Union v. Long Island Railroad Co.*, ... U.S. ....., 102 S.Ct.

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trust prohibitions which interfere with state and local government regulation of ambulance service address matters that are indisputably attributes of state sovereignty. Compliance with the federal antitrust laws in this case would directly impair the ability of the State of Missouri and the City of Kansas City to structure integral operations in their traditional government function of providing for the health and safety of their citizens.[10]

IV. *Sherman Act Claims Against Remaining Defendants*

In Counts I and II of their complaint, plaintiffs allege that defendants Hadley Reimal, Lawrence Hughes, and June and Eugene DeSaulniers illegally merged their companies into one corporation, ASI, in order to foreclose com-

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Footnote continued—

1349, 71 L.Ed.2d 547 (1982). In this case the Supreme Court found that "operation of a passenger railroad is not among those [state] governmental functions generally immune from federal regulation" under the Tenth Amendment. ____ U.S. at ____, 102 S.Ct. at 1354. The case at bar is distinguishable from United Transportation Union. United Transportation Union dealt with railroads, which have been the subject of extensive federal regulation for nearly a century. There is no comparable history of federal regulation of ambulance service, which has traditionally been an area of state and local concern.

10. Even if the City's actions were not permitted by the state action exemption and the Tenth Amendment, it is not clear that plaintiffs could recover the relief they seek. Plaintiffs ask for both injunctive and monetary relief. Neither *Lafayette* nor *Community Communications,* the two cases dealing with antitrust actions against cities, reached the issue of whether damages could be recovered from a municipality for its violation of the antitrust laws.

In this case plaintiffs are engaged in the ambulance business for private gain. The City, on the other hand, is seeking to protect its citizens' health and safety. The City not only makes no profit from its ambulance service system, it in fact expends tax money to subsidize the system. Under the circumstances, we do not believe the City should be held liable in damages to plaintiffs.

petition in the ambulance service industry in Kansas City. Plaintiffs also contend that defendants Reimal, Hughes, and the DeSaulniers conspired with defendant Jack Stout and his consulting company, Fourth Party, Inc., to persuade the City of Kansas City to institute a public utility model for ambulance service, thus leading to the monopolization of ambulance service in the Kansas City area.

[7, 8] It is clear that if plaintiffs' allegations were confined to defendants' attempts to induce Kansas City to institute a public utility model for ambulance service, they would fail to state a claim under the Sherman Act. Such actions do not violate the Sherman Act because they amount to nothing more than the exercise of defendants' First Amendment rights to attempt to change government policy. First Amendment activities are exempt from the federal antitrust laws under the doctrine announced in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961). The fact that some of the defendants may have been acting to further their own economic interests at the expense of their competitors is immaterial for purposes of the *Noerr* exemption as long as they were legitimately attempting to change governmental policy. *Mark Aero, Inc. v. Trans World Airlines, Inc.*, 580 F.2d 288 (8th Cir. 1978).

[9] However, plaintiffs allege that defendants Reimal, Hughes and the DeSaulniers did more than merely attempt to influence the actions of the City Council. Plaintiffs state that these defendants illegally combined their companies into one in order to foreclose competition in the ambulance service industry in Kansas City. Such action goes beyond the exemption set out in *Noerr*. For that reason, this Court declines to grant summary judgment as to defendants Reimal, Hughes, the DeSaulniers

and their former company, ASI, on plaintiffs' Sherman Act claims.[11]

[10] As to defendants Jack Stout and Fourth Party, Inc., however, summary judgment is appropriate. Mr. Stout and his company were hired by the City to study the possibility of enacting a public utility model for ambulance services, and later were employed by MAST as negotiators in dealing with ASI. There is no allegation that Mr. Stout or Fourth Party did anything other than what the City and MAST authorized them to do. Jack Stout and Fourth Party thus share the state action and Tenth Amendment exemption of the City and MAST. *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561 (10th Cir. 1962), *cert. dismissed*, 371 U.S. 801, 83 S.Ct. 13, 9 L.Ed.2d 46 (1962); *Champaign-Urbana News Agency, Inc. v. J. L. Cummins News Company, Inc.*, 479 F.Supp. 281 (C.D.Ill.1979), *aff'd* 632 F.2d 680 (7th Cir. 1980). For that reason, summary judgment must be granted for defendants Jack Stout and Fourth Party, Inc., on plaintiffs' Sherman Act claims.

V. *Missouri Antitrust Law Claims*

[11] As both plaintiff and defendants concede, the Missouri antitrust statutes, Mo.Rev.Stat. §§ 416.031 *et seq.*, are to be interpreted in accordance with federal antitrust laws. Since the actions of defendants City of Kansas City, MAST, Jack Stout and Fourth Party, Inc. are exempt under the federal antitrust laws, they are also exempt under the state antitrust laws. *Fischer, Spuhl, Herzwurm & Associates, Inc. v. Forrest T. Jones & Company*, 586 S.W.2d 310 (Mo. en banc 1979).

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11. As we noted above, defendants Hughes, Reimal and the DeSaulniers sold all the stock of ASI to MAST in September, 1981. There is, however, no dispute that defendants created ASI and owned it until the time of the sale to MAST.

VI. *42 U.S.C. § 1983 and Fourteenth Amendment Claims*

In Count IV of their complaint, which is brought under 42 U.S.C. § 1983, plaintiffs allege numerous violations of their substantive due process, procedureal due process and equal protection rights. In Count V, which is brought directly under the Fourteenth Amenment to the United States Constitution, plaintiffs allege violations of their due process rights. We will discuss the substantive due process, procedural due process and equal protection issues separately.

A. *Substantive Due Process*

Plaintiffs' substantive due process claims are vague and imprecise. Essentially, however, plaintiffs are claiming that their due process rights have been violated because the City is preventing them from contracting with potential customers and otherwise operating their ambulance company. They also contend that the City is depriving the citizens of Kansas City of their right to choose the ambulance company which they wish to have serve them.

[12, 13] Plaintiffs argue that they have been deprived of their constitutional right to run an ambulance service company. There is, however, simply no substantive due process right to engage in a particular business. Kansas City is free to regulate ambulance companies in the public interest even if the regulations have the effect of preventing plaintiffs from conducting their business in the city. *Brenner v. State Board of Motor Vehicle Manufacturers, Dealers and Salesmen*, 413 F.Supp. 639 (E.D.Pa.1976).

[14] The ordinance which plaintiffs challenge is essentially a measure passed by the City to protect the public health, safety and welfare. The ordinance does

not infringe on any fundamental right, such as the right to privacy or the right to vote, and as such need not be strictly scrutinzed by this Court.

[15] Economic regulations such as are involved in this case need not be perfectly drawn in order to be constitutional. As long as the challenged law is passed in proper exercise of the government's police power, the only requirement is that its provisions bear some rational relationship to the purpose that the law seeks to achieve. *Kelley v. Johnson*, 425 U.S. 238, 96 S.Ct. 1440, 47 L.Ed.2d 708 (1976). As the Supreme Court stated in the case of *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563, 572 (1955), "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."

[16] The Kansas City ordinance challenged by plaintiffs meets the "rational relationship" standard. Kansas City's stated purpose in passing this ordinance was to protect public health and safety by improving Kansas City's ambulance service. Kansas City officials were concerned that competition in the ambulance service industry was harming the public. Setting up the monopoly public utility model, in which the receipt of payment for ambulance service is not based on a company's ability to compete for business, is a reasonable means of improving service. Kansas City's ordinance is not arbitrary or capricious; it is reasonably related to the purpose it seeks to achieve.

[17] Plaintiffs further complain that the citizens of Kansas City have been denied their right to choose the ambulance service they wish to have serve them. Again,

it is not clear that any such constitutional "right" in fact exists. Even if it does, however, plaintiffs are not the proper parties to raise it. Plaintiffs have no standing to assert the rights of the citizens of Kansas City.

[18] The general rule is that a litigant "may not claim standing . . . to vindicate the constitutional rights of some third party." *Barrows v. Jackson*, 346 U.S. 249, 73 S.Ct. 1031, 97 L.Ed. 1586, 1594 (1953). The narrow exception to this rule was set forth in the case of *Singleton v. Wulff*, 428 U.S. 106, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976). In *Singleton* several physicians challenged a Missouri statute which denied Medicaid benefits for abortions which were not medically required. The physicians sought to litigate not only their own right to perform abortions, but also the right of their patients to receive medical advice and treatment. In ruling that the physicians could assert the rights of their patients, the Court emphasized two factors: the relationship between the litigants and the third parties, and the ability of the third parties to assert their own rights.

This case differs significantly from *Singleton*. The interest of the citizens of Kansas City in choosing their own ambulance company does bear some relationship to plaintiffs' interest in providing ambulance service, and it may be difficult for Kansas Citians to protect their interest effectively in court. However, there is no close, confidential relationship between plaintiffs and the citizens of Kansas City as there was between the physicians and their patients in *Singleton*. In addition, while the interests of the plaintiffs in *Singleton* were virtually identical to the interests of the third parties whose rights they sought to litigate, such is not the case here. Plaintiffs in this case are primarily interested in being allowed to operate their company at a profit and without regulatory interference. Kansas Citians, on the other hand, have an interest in the

quality of the ambulance service that is provided. Kansas Citians' interest in high quality ambulance services is at odds with plaintiffs' narrow interest in making a profit. Thus, plaintiffs would not be effective proponents of the rights of Kansas Citians.

B. *Procedural Due Process*

Plaintiffs allege that their procedural due process rights were violated because Kansas City issued the sole City ambulance service license to ASI and renewed that license without following the requirements of its own ordinances, and because the license renewal was granted to ASI without giving plaintiffs notice and an opportunity to be heard.

[19, 20] Plaintiffs must show a cognizable Fourteenth Amendment property or liberty right which would be protected by the procedural due process measures which plaintiffs state should have been given. As already noted in the discussion of the substantive due process issue, plaintiffs had no due process right to operate an ambulance service company. They also have no liberty or property interest in the license which was granted by the City. The mere fact that plaintiffs would like to have a license, or that such a license would have great monetary value to them, is not enough. As the Supreme Court has stated, "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548, 561 (1972). Plaintiffs can point to nothing which indicates that they had such an entitlement. Plaintiffs do not claim that officials of the City of Kansas City promised them a license or even promised them an op-

portunity to compete for a license. Plaintiffs' interest in the Kansas City ambulance license was at best a mere expectancy which is not entitled to procedural due process.

[21] In charging that the City violated their due process rights by failing to follow its own rules, however, the plaintiffs seem also to be implying that they have some due process right in the use of a particular *procedure* for granting ambulance service licenses. This argument must be rejected. Even assuming that the City did violate its own rules and acted illegally in giving ASI the sole provider license, the City's actions do not give rise to a procedural due process claim on the part of plaintiffs. In a Western District of Pennsylvania case, *Three Rivers Cablevision, Inc. v. City of Pittsburgh*, 502 F.Supp. 1118 (W.D.Pa.1980), plaintiffs claimed that their procedural due process rights were violated because they were denied a cable television contract in favor of another company which had not followed the detailed bidding procedures set out by the City of Pittsburgh. The Court rejected plaintiffs' argument that they had some due process interest in having the bidding procedure carried out according to the City's own rules.[12] The Court stated:

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12. The Court ultimately found that plaintiffs did have some due process property interest in the cable television contract itself. The Court's holding was very limited, however. The Court essentially held that, once the city had decided to go through with the bidding procedure, it was required to act nonarbitrarily in deciding which bidder should be awarded the contract. Even the very limited due process right recognized by the court in *Three Rivers* is not universally accepted. *See, e.g., Estey Corporation v. Matzke*, 431 F.Supp. 468 (N.D.Ill.1976), in which the court stated categorically that a bidder on a government contract had no property interest at all in the contract "until such time as the contract is actually awarded to him." *Id.* at 470. In any case, *Three Rivers* is clearly distinguishable from the case at bar since, in this case, the bidding procedure was simply not used at all. (For a more complete discussion of the *Three Rivers* case, see *Kendrick v. City Council of Augusta, Georgia*, 516 F.Supp. 1134 (S.D.Ga.1981).)

> Recognition of the fact that the violation of a law is not, ipso facto, a deprivation of due process to all persons affected thereby is fundamental to an understanding of procedural due process. . . . [T]here can be no property interest in a procedure itself; if there be a protected interest involved here, it is to be found in the *benefit* whose enjoyment is sought to be regulated by the procedure; namely the award of the contract. (Emphasis in original.)

502 F.Supp. at 1128-29.

Thus, the fact that Kansas City failed to follow its own rules in issuing a license to ASI does not create a procedural due process right in plaintiffs absent a showing of some entitlement to the license itself.

C. *Equal Protection*

Plaintiffs allege that their equal protection rights have been violated because the City has established "dual standards" for granting ambulance service licenses, and because the City is seeking to compel plaintiffs to obey its ordinances and regulations, while not so compelling ASI.

[22-24] As is the case with substantive due process questions, there are two standards of review of equal protection issues. If the challenged law makes a classification based on "suspect criteria" such as race or national origin, the courts will strictly scrutinize the law. As to economic measures, such as the ordinance at issue here, the court will apply only a "rational relationship test—that is, if the classification created by the law bears a rational relationship to the purpose of the law, then there is no violation of equal protection. As the Supreme Court has stated in *Hughes v. Alexandria Scrap Corporation*, 426 U.S. 794, 96 S.Ct. 2488, 49 L.Ed.2d 220, 233 (1976), "[A]

statutory classification impinging upon no fundamental interest, and especially one dealing only with economic matters, need not be drawn so as to fit with precision the legitimate purposes animating it."

[25] In view of the above standard, plaintiffs' equal protection claims cannot stand. Essential to every licensing system, whether it affects ambulance service or any other industry, is a procedure by which the licensing authority distinguishes between those who qualify for licenses and those who do not qualify for them. If such "classifications" were unconstitutional under the equal protection clause, then no licensing system could exist. No "dual standards" were used in granting the ambulance service license. Rather, it is apparent that Kansas City officials thought plaintiffs could not provide the scope of ambulance service which the City needed, and so no license was offered to them. Even if the City did employ "dual standards" in granting the ambulance service license, however, plaintiffs have alleged nothing which would tend to show that the standards used were not rationally related to the City's purpose of improving ambulance service.

[26, 27] Plaintiffs' allegation that the City is seeking to compel plaintiffs to obey its ambulance service ordinance while not so compelling ASI cannot form the basis of an equal protection claim. In order to make out a case for discriminatory enforcement, plaintiffs must show (1) that they have been singled out and compelled to comply with the law while others similarly situated have not been so compelled, and (2) that the government's singling out of plaintiffs was based upon an impermissible ground such as race, religion or plaintiffs' exercise of their First Amendment rights. *United States v. Larson*, 612 F.2d 1301 (8th Cir. 1980), *cert. denied* 446 U.S. 936, 100 S.Ct. 2154, 64 L.Ed.2d 789 (1980); *Oyler v. Boles*, 368 U.S. 448, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962).

Plaintiffs cannot meet these two requirements. ASI, unlike Gold Cross and Transfer, has a city license to operate. Kansas City is not discriminating between two similarly situated companies. Rather, Kansas City is distinguishing between the company which has a license and those which do not. Such "unequal treatment" is the very purpose of the City's ambulance ordinance—as it is the purpose of virtually every licensing ordinance in effect.

Plaintiffs also cannot show the second element of the discriminatory enforcement test. Plaintiffs have not alleged that Kansas City's choice to enforce its ordinance against them is based on any impermissible ground. Rather, it is apparent that the City's enforcement actions are based on plaintiffs' failure to have the required city license.[13]

For the foregoing reasons, summary judgment must be granted for defendants on plaintiffs' Counts IV and V.

CONCLUSION

We are aware that "courts do not lightly enter summary judgment on the merits in antitrust cases." *Willmar Poultry Co. v. Morton-Norwich Products, Inc.*, 520 F.2d 289, 292 (8th Cir. 1975), *cert. denied*, 424 U.S. 915, 96 S.Ct. 1116, 47 L.Ed.2d 320 (1976). In this case, however, there is no genuine issue as to any material fact, and the moving parties are therefore entitled to partial summary judgment as a matter of law. As plaintiffs themselves state, "MAST's counsel admitted . . . that the defendants have

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13. Apparently at one point in 1981 ASI was operating without a city license because the license had been allowed to lapse. Plaintiffs could thus contend that during the period ASI was without a license it was "similarly situated" with Gold Cross and Transfer. However, this would satisfy only the first of the two elements needed for a valid discriminatory enforcement claim.

done what plaintiffs say they have done. The only question is whether they are subject to the law." Plaintiffs' Brief of December 15, 1982, at page 2. We have carefully examined the pleadings, briefs and exhibits filed in this case, along with the transcript of the hearing held before Judge Scott O. Wright on March 13, 16 and 17, 1981, and have concluded that this is a proper case for partial summary judgment.

It is therefore

ORDERED that on plaintiffs' Counts I, II, and III summary judgment is granted against plaintiffs and for defendants City of Kansas City, MAST, Jack Stout and Fourth Party, Inc. It is further

ORDERED that on plaintiffs' Counts I, II and III, summary judgment is denied as to defendants Hadley Reimal, Lawrence Hughes, June and Eugene DeSaulniers, and ASI. It is further

ORDERED that on plaintiffs' Counts IV and V, summary judgment is granted against plaintiffs and for all defendants.

The Court finds further that this case is a proper one for certification under Rule 54(b), Fed.R.Civ.P., which allows the District Court to direct the entry of a final judgment as to one or more claims or parties in a case which contains multiple claims or parties. We find that there is no just reason for delay as to those portions of plaintiffs' case on which summary judgment has been granted. The legal issues involving these parties and claims are separate, distinct and independent of the issues involved in the claims against the remaining defendants. Those portions of plaintiffs' case on which summary judgment is being granted involve questions of the application

of the state action exemption and the Tenth Amendment to the actions of the City of Kansas City, MAST and their agents. They also involve the application of 42 U.S.C. § 1983 and the Fourteenth Amendment to the United States Constitution. None of these issues will affect plaintiffs' claims against the remaining defendants, four individuals and a corporation, since these issues are of importance only when a governmental entity is a party.

We realize that certification under Rule 4(b) should not be lightly granted. However, the particular facts of this case lead us to conclude that this is a proper case for the direction of entry of final judgment under that rule. *Curtiss-Wright Corporation v. General Electric Company*, 446 U.S. 1, 100 S.Ct. 1460, 64 L.Ed.2d 1 (1980). It is therefore

ORDERED that final judgment shall be entered against plaintiffs and for defendants City of Kansas City, MAST, Jack Stout, and Fourth Party, Inc., as to plaintiffs' Counts I, II, III, IV and V. It is further

ORDERED that final judgment shall be entered against plaintiffs and for defendants Hadley Reimal, Lawrence Hughes, June and Eugene DeSaulniers and ASI on plaintiffs' Counts IV and V.

APPENDIX C

§ 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance or minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by

fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

§ 2. Monopolizing trade a misdemeanor; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

67.300. Counties and cities, towns and villages authorized to operate ambulance service—rates may be set—insurance may be purchased

1. Any county, city, town or village may provide a general ambulance service for the purpose of transporting sick or injured persons to a hospital, clinic, sanatorium or other place for treatment of the illness or injury, and for that purpose may

(1) Acquire by gift or purchase one or more motor vehicles suitable for such purpose and may supply and equip the same with such materials and facilities as are necessary for emergency treatment, and may operate, maintain, repair and replace such vehicles, supplies and equipment;

(2) Contract with one or more individuals, municipalities, counties, associations or other organizations for the operation, maintenance and repair of such vehicles and for the furnishing of emergency treatment;

(3) Employ any combination of the methods authorized in subdivisions (1) and (2) of this section.

2. The municipality or county shall formulate rules and regulations for the use of the equipment and may fix a schedule of fees or charges to be paid by persons requesting the use of the facilities and provide for the collection thereof.

3. The municipality or county may purchase insurance indemnifying against liability of the county or city and the driver and attendants of the ambulance for the negligent operation of the ambulance or other equipment or supplies or in rendering services incidental to the furnishing of the ambulance service.

416.031. Restraint of trade prohibited

1. Every contract, combination or conspiracy in restraint of trade or commerce in this state is unlawful.

2. It is unlawful to monopolize, attempt to monopolize, or conspire to monopolize trade or commerce in this state.

3. It is unlawful for any person[1] engaged in trade or commerce in this state, in the course of such trade or commerce, to lease or make a sale or contract for sale of any commodity, whether patented or unpatented, for use, consumption, or resale within this state, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for such sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of trade or commerce in this state.

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1. Word "persons" appears in original rolls.

THIS ORDINANCE
EFFECTIVE IMMEDIATELY

[Form 1907a - Law]

COMMITTEE SUBSTITUTE FOR ORDINANCE 50775

AN ORDINANCE

AMENDING CHAPTER 18 OF THE KANSAS CITY CODE OF GENERAL ORDINANCES RELATING TO HEALTH AND SANITATION BY REPEALING ARTICLE X THEREOF ENTITLED "AMBULANCE SERVICE" AND ENACTING IN LIEU THEREOF A NEW ARTICLE X ENTITLED "AMBULANCE SYSTEM CODE"; EMPOWERMENT OF PROMULGATING RULES AND REGULATIONS TO THE DIRECTOR OF HEALTH; DELEGATION OF POWERS TO AN EMERGENCY MEDICAL SERVICES PUBLIC TRUST; PLACING RESTRICTIONS UPON THE PUBLIC TRUST METHOD OF OPERATING AN AMBULANCE SERVICE WITHIN THE CITY OF KANSAS CITY; REQUIRING LICENSES FOR AMBULANCE VEHICLES; REQUIRING CERTIFICATION OF AMBULANCE PERSONNEL; REQUIRING PROVISIONS FOR PHYSICIAN-DIRECTED MEDICAL AUDIT; CREATION OF A PHYSICIAN ADVISORY BOARD AND VESTING IN SAID BOARD CERTAIN DUTIES AND RESPONSIBILITIES; PROVIDING FOR SEPARATE CERTIFICATION OF SPECIALIZED ADVANCED LIFE SUPPORT TRANSFER UNITS; PROVIDING FOR EMERGENCY TAKEOVER OF CERTAIN AMBULANCE OPERATIONS BY THE PUBLIC TRUST IF NECESSARY TO PROTECT PUBLIC HEALTH AND SAFETY, AND LIMITING THE DURATION OF SUCH EMERGENCY TAKEOVER; AND PROVIDING REMEDIES AND FIXING PENALTIES; PROVIDING FOR SEVERABILITY; ESTABLISHING AN EFFECTIVE DATE; AND DECLARING AN EMERGENCY.

WHEREAS, the Council has determined that there is substantial evidence to indicate that an ambulance service providing only nonemergency services is clinically unsound inasmuch as it is impossible to presumptively determine the minimum skills that will be required in handling a patient during a particular run, and therefore the Council has determined that an ambulance service operating within the confines of the City of Kansas City, Missouri, shall provide both emergency and nonemergency services so as to not unduly threaten, or make unsafe, the lives of the City's citizens; and

WHEREAS, the Council has determined that for the public health and safety there is a need to require of an ambulance service, as defined herein, a minimum number of vehicle units, meeting the standards specified herein to handle the "peak load" periods of demand for emergency services, and the Council shall empower its Director of Health to determine, from time to time, the minimum number of vehicle units an ambulance service must have available to activate for these "peak times", and such minimum number of available vehicle units shall become a requirement to be an ambulance service operating within the confines of the City of Kansas City, Missouri; and

WHEREAS, the Council has determined that it is necessary to the public health and safety that a Public Trust be empowered to take such steps as are necessary to insure the availability of ambulance services to the citizens of Kansas City, Missouri, in conformance with the standards that are set forth, herein, as to avoid the possibility that Kansas City, Missouri would ever be without the availability of quality emergency medical services, and as such the City Council shall grant such Public Trust a franchise to operate or cause to be operated an ambulance service system for the City of Kansas City,

Missouri, and for neighboring areas in the event appropriate contractual relationships can be developed with those neighboring areas for the equitable sharing of costs; and

WHEREAS, the Council has determined that since the public cannot effectively quality/price shop for emergency medical services; and since there may be only one ambulance operator within the confines of the City of Kansas City, Missouri, the City shall, from time to time, approve rates for services rendered by the ambulance operator; and

WHEREAS, the Council has determined that its Public Trust for Emergency Medical Services must use procurement procedures for contracting for ambulance service operations that will encourage competitive pricing of said services to the Public Trust. Further, the Council has determined that, in the event of an emergency wherein the public health and safety is threatened by poor performance of an existing ambulance service contractor, or by absence of qualified bids at reasonable prices for the performance of these services, the Public Trust may actually operate the service system using Public Trust employees hired for these purposes, but the maximum duration of such emergency operations by the Public Trust shall not exceed six (6) months during any single episode before competitive procurement procedures are once again exercised; and

WHEREAS, the Council has determined that a need exists for the Director of Health to establish rules and regulations, under the advisement of licensed physicians who are competent in the field of emergency medicine, governing the quality of prehospital emergency medical services, quality control procedures, and medical protocols as they affect the prehospital emergency medical services industry in Kansas City, Missouri, NOW, THEREFORE,

BE IT ORDAINED BY THE COUNCIL OF KANSAS CITY:

Section A. Repeal and enactment. That Chapter 18 of the Kansas City Code of General Ordinances is amended by repealing Article X thereof, entitled "Ambulance Service" and enacting in lieu thereof a new Article X entitled "Ambulance System Code" containing the following new or revised numbered sections:

ARTICLE X. AMBULANCE SYSTEM CODE

Section 18.195 Definitions.

For purposes of this Article, the following terms, phrases, words and their derivation, shall have the meaning given herein. When not inconsistent with the context, words used in the present tense include the future, words used in the plural include the singular, words used in the singular include the plural. The word "shall" as used herein is not merely directory but is considered mandatory.

Unless otherwise specified, the following terms are defined:

(a) *Ambulance*: Any motor vehicle constructed, reconstructed, arranged, equipped, used or meant for use of transporting ill, injured, or otherwise incapacitated persons from one place to another. Ambulance vehicles shall be classified by the Director pursuant to rules and regulations promulgated governing vehicle configuration, construction, and equipment.

(b) *Ambulance Permit*: The operating permit issued by the City which an operator is required to obtain annually and to maintain as provided for in this ordinance for each and every motor vehicle operated as an ambulance.

(c) *Ambulance Service*: Any business or service established to transport patients from one place to another within the City, and which shall meet all the standards governing the operation of an ambulance service in the City, and which shall have a franchise to operate such service within the City.

(d) *Approved Consultation Physician*: A licensed physician approved by the Physician Advisory Board to provide emergency medical advice and direction to an EMT who is certified and acting subject to the provisions of this ordinance.

(e) *Apprentice Attendant*: A person desiring to become a certified attendant who, for a period of time, is in training and not yet fully eligible for certification as an attendant.

(f) *Apprentice Driver*: Any person desiring to become a licensed driver who, for a period of time, is in training and not yet fully eligible for licensure as a driver, and who is a certified EMT.

(g) *Attendant*: Any individual who is responsible for the care of a patient within an ambulance vehicle, and who has met certification standards, and received such certification, pursuant to rules and regulations promulgated by the Director.

(h) *City*: Kansas City, Missouri.

(i) *Council*: The City Council of the City of Kansas City, Missouri.

(j) *Director*: The Director of Health for Kansas City, Missouri.

(k) *Dispatcher*: Any individual EMT who performs dispatching and system status management functions at the EMS Control Center, and who has been certified as a Dispatcher as provided for herein.

(l) *Driver*: Any individual EMT who operates or attempts to operate an ambulance vehicle on the streets, alleys, or other public thoroughfares within the corporate limits of Kansas City, Missouri, and who otherwise meets the standards for a "driver" promulgated by the Director.

(m) *Emergency Physician Organization*: Any nonprofit organization composed of and controlled by licensed physicians who are all regularly engaged in the professional practice of emergency medicine in Kansas City, Missouri, whose membership may not prohibit any qualified physician from becoming a member, which has a Board of Directors of not less than seven (7) members, and which provides for nonvoting associate members who are not physicians regularly engaged in the practice of emergency medicine.

(n) *EMS Control Center*: Any location designated by the Director which shall serve as an emergency operations center for emergency medical services dispatching and system control.

(o) *EMT*: Emergency Medical Technician, as certified in various categories of competence, as provided for herein.

(p) *EMT-Paramedic*: Emergency Medical Technician-Paramedic, certified as provided for herein.

(q) *Life-Threatening Emergency*: Means by way of illustration and not by way of exclusion any one or more of the following:

> Acute respiratory distress, shock, airway blockage, bleeding beyond control, acute poisoning, acute cardiovascular distress, or central nervous system injury.

(r) *Metropolitan Ambulance Services Trust (Public Trust)*: A Trust created for use and benefit of Kansas City, Missouri that is empowered by the City to take such steps as necessary to insure the availability of quality emergency medical services to the citizens of Kansas City, Missouri.

(s) *Operator*: Any person, firm, or corporation engaged in the business of providing routine transfer and emergency ambulance services holding a valid operator's license, as defined herein, issued by the City.

(t) *Person*: Any individual, firm, association, partnership, corporation or other group or combination acting as a unit.

(u) *Physician Advisory Board*: That Board created by this ordinance which is composed of five (5) licensed physicians, appointed by the Mayor, and who are members of the then-current Board of Directors of the emergency physician organization contracted by the City to conduct its quality control functions.

(v) *Presumptive Run Designation—Code 1*: Any ambulance service request wherein a reasonable person under the circumstances would have reason to believe, from information obtained from the person requesting service in the course of an information-gathering conversation conforming to approved Dispatcher protocols, that a time-critical, life-threatening emergency situation may exist at the scene.

(w) *Presumptive Run Designation—Code 2*: Any ambulance service request wherein a reasonable person under the circumstances would have reason to believe, from information obtained from the person requesting service in the course of an information-gathering conversation conforming to approved Dis-

patcher protocols, that an emergency medical condition exists at the scene for which prompt response is appropriate for medical and humanitarian reasons, but that such situation apparently involves no immediate threat to human life of a time-critical nature.

(x) *Presumptive Run Designation—Code 3*: Any ambulance service request wherein a reasonable person under the circumstances would have reason to believe, from information obtained from the person requesting service in the course of an information-gathering conversation conforming to approved Dispatcher protocols, that the request is for nonemergency transportation of a person whose apparent condition could not appropriately be presumptively defined as either Code 1 or Code 2.

(y) *Response Time*: The actual elapsed time, measured in minutes and seconds, between close of receipt of notification of the EMS Control Center that the ambulance is needed at a location and the arrival of the ambulance at the location specified by the EMS Control Center.

(z) *Retrospective Run Designation—All Codes*: The run code designation assigned to a run by the Senior EMT In Charge after direct physical contact with the patient. Such retrospective designations may properly differ from prospectively assigned run code designations on a given run, but shall not serve to alter the original presumptive run code assignment.

(aa) *Senior EMT In Charge*: That EMT-Paramedic on an ambulance trip who is designated by the operator employing the EMT as being primarily responsible for control of the ambulance and its operation.

Section 18.196. Delegation of Powers to EMS Public Trust.

The Metropolitan Ambulance Services Trust, hereinafter referred to as "Public Trust", is hereby directed to take such steps as are necessary to insure the availability of ambulance services to the citizens of Kansas City, Missouri, in conformance with the standards set forth herein, and is hereby granted an ambulance service franchise, pursuant to Chapter XV of the City Charter, by the City to carry out its duties and responsibilities for a period of fifteen (15) years.

A. Public Trust shall operate or cause to be operated an ambulance service system for Kansas City, Missouri, and for neighboring areas in the event appropriate contractual relationships can be developed with those neighboring areas for the equitable sharing of costs; provided, however, that such ambulance service operated by the Public Trust shall be exempt from requirements to apply for and maintain an ambulance license and permits under this ordinance, but the service so operated under Public Trust's auspices must have the following characteristics:

1. The services must at all times be in compliance with all provisions of this ordinance.

2. All emergency equipment utilized in this service must be owned by or leased to Public Trust as primary lessee; provided, however, that such service system may utilize vehicles for intercity transfer work which are not owned by or leased to the Public Trust.

3. No billing or collection functions may be performed by that subcontractor employed by the Public

Trust for the operation of the Public Trust's ambulances and control center operations.

4. Public Trust shall contract with another organization for the purpose of supplying all labor and management services for the operation of its EMS Control Center operations and ambulance operations, and procurement methods utilized in securing this contract shall be of a nature that encourages the competitive pricing of potential contractors' services to the Public Trust. Provided, however, that in the event of an emergency wherein public health and safety are threatened by the poor performance of an existing operations contractor, or by the absence of qualified bids at reasonable prices for the performance of these services. Public Trust may directly operate the service system using Public Trust employees hired for these purposes, but the maximum duration of such emergency operations by Public Trust shall not exceed six (6) months during any single episode, at which time competitive procurement procedures for an ambulance service operator shall be initiated.

B. Any person or organization contracted by the Public Trust to operate the Trust's control center and ambulance operations shall not be a public agency or not-for-profit organization, and shall be required to apply for and maintain an ambulance operator's license and vehicle permits issued pursuant to this ordinance, but such contractor may then operate under the Trust's ambulance franchise without obtaining a franchise of its own, however, any and all provisions applicable to an ambulance franchise holder under this ordinance shall be automatically applicable to the Trust's contractor engaged to perform these control center and ambulance operation service functions.

Section 18.197. Licenses, Permits, Certifications, and Franchise Required.

A. No person or organization shall operate an ambulance for the purpose of transporting the sick, injured, or infirm, either on an emergency or routine transfer basis for hire upon any street within the corporate city limits of Kansas City, Missouri, unless he holds a currently valid license and franchise for an ambulance service issued pursuant to this ordinance.

B. No ambulance shall be operated, and no individual shall drive nor attend it on the streets, alleys, or public way or place of the City, unless that ambulance shall have a current permit as an ambulance, pursuant to one of the ambulance classification types, as promulgated and regulated by the Director.

C. No person shall be employed or otherwise permitted to drive or attend ambulances subject to this ordinance, unless he shall hold currently valid certification as an attendant EMT, as appropriate for the level of service and skill required, or an apprentice certification for such positions, issued pursuant to this ordinance.

D. Provided, however, licenses, permits, and certification shall not be required for ambulance services, ambulances, drivers, or attendants of such ambulances; which are:

1. owned and operated by an agency of the United States Government; or
2. rendering requested assistance to ambulances currently licensed in cases of disaster or major emergency too great for local resources; or in response to provisions of a written community "mutual aid agreement"; or

3. engaged in transporting a person from a location outside the city limits to a location inside the city limits; or

4. rendering ambulance services pursuant to an ambulance service contract to a municipal agency defined in Subparagraph 5, below; or

5. municipal service agencies, including police and fire rescue units and Public Trust; or

6. private companies which use an ambulance solely for the transportation of their employees for illness or injuries sustained while performing their work; or

7. operating a privately owned ambulance designed especially for the transportation of the infirm or physically handicapped where said ambulance is used solely for the benefit of the owner and not for hire.

E. Ambulances picking up patients within the corporate limits of the City are not exempt under this Section, regardless of the designation of the patient, or the location of the headquarters of the ambulance service, unless qualified for exemption under this Subsection 18.197.

F. Any person having been issued an operator's license, and Public Trust, and any municipal service agency operating ambulance services, shall comply with all provisions of this Chapter, and the standards and regulations adopted hereunder, as well as all other applicable local, state, and federal law.

G. As a condition prerequisite to application for an operator's license, the applicant shall first apply for and receive an ambulance operator's franchise. Such application shall be made in a form and shall contain such infor-

mation as may be required by the Director. The Council recognizes that the reliable availability of quality ambulance services, both routine and emergency, 24 hours a day, and in all parts of the City regardless of the income levels of the residents thereof, is in part dependent upon:

1. the financial stability and character of the organization or organizations providing ambulance services within the City;

2. the absence of business practices detrimental to the stability of the local ambulance industry, such as "skimming", e.g., rendering high profit services in affluent areas while discouraging or avoiding responsibility for delivery of necessary but less profitable services;

3. the availability of a sufficient volume of business to sustain the substantial fixed costs of a sophisticated advanced life support system;

4. the presence of sufficient production capacity to safely supply occasional peak-load demand for emergency service.

Therefore, the Director shall make such investigations into the proposed and existing business practices of applicants for an ambulance service franchise, and shall grant such a franchise only when the Director has found that the proposed operation will: have adequate financial strength to reliably render the proposed services over the period of the franchise; conduct its business practices in a manner which does not undermine the overall financial stability of the local ambulance industry; service an area of sufficient population to support full scale advanced life support service production; and command adequate production capacity to service peak load emergency requirements of the area to be served. Any such franchise

issued shall be for the provision of both emergency and nonemergency ambulance service for a given geographical area, and such franchise if issued by the Director shall be valid for a period of one (1) year (except for that issued hereunder to the Public Trust), and shall be issued without charge to the applicant, and requirements for renewal shall be the same as the requirements for initial issuance.

Section 18.198. Application for Licenses, Permits and Certification.

A. *Licenses for ambulance service*: Application for a license to provide ambulance services hereunder shall be made on such forms as may be described, prepared or prescribed by the Director of Health, and shall contain such information as shall be required pursuant to regulations promulgated by the Director. Applications for ambulance service licensure shall be accompanied, at a minimum, by the following:

1. A copy of the ambulance service franchise issued by the Director to the applicant, unless that applicant is a subcontractor to the Public Trust.

2. An application processing fee of thirty-five dollars ($35.00) which shall not be refundable in the event the application is denied.

3. Written evidence in the form of a signed agreement that arrangements have been made by the applicant for 24-hour physician consultation by radio communications to all ambulances operated by the applicant as required under Section 18.203 of this ordinance.

4. *The financial ability and responsibility of the applicant.* Upon receipt of an applicant for an

operator's license, the Director shall cause an investigation to be made of the applicant and the proposed application shall be referred to the Physician Advisory Board for evaluation and recommendation. The findings and recommendations of the Physicans Advisory Board shall be submitted to the Director for approval or denial of the application. If approved, an operator's license shall be issued by the Director. Operator licenses shall be issued for a period of one (1) year from the date of issuance. An operator's license may be suspended or revoked by the Director for good cause and shall not be transferable to any other person without the approval of the Director.

B. *Vehicle Permits*: Only persons holding operator licenses may apply for ambulance vehicle permits. Applications for ambulance permits hereunder shall be made on such forms as may be described, prepared, or prescribed in Health Department regulations, and:

1. Each application for a vehicle permit shall be accompanied by an inspection fee of seventy-five dollars ($75.00), which fee shall not be refundable in the event the application is denied, and which fee shall entitle the applicant for permit to an initial inspection, one (1) additional inspection which must take place within thirty (30) days after the initial inspection in the event the application was denied upon the initial inspection, and two (2) unscheduled inspections which shall be performed without notice at any time during the period such permit is valid. Each such permit shall be issued for a period of one (1) year and may be suspended by the Director in the event any later inspection indicates the vehicle or its

on-board equipment is not being maintained in good operating order or is not in compliance with applicable standards and regulations, and, in the event of such suspension, that vehicle shall not be utilized as an ambulance until a subsequent inspection demonstrates that the deficiency has been corrected. Each time a new inspection must be scheduled as a result of suspension of a permit, the operator shall pay an additional inspection fee of fifty dollars ($50.00) which shall not be refundable in the event the application for reinstatement of the permit is denied.

2. An operator holding valid ambulance vehicle permits as of the date of the passage of this ordinance which were issued by the City pursuant to the provisions of Chapter 18, Article X, Code of General Ordinances, "Health and Sanitation", repealed hereby, shall have the right to utilize ambulance vehicles so licensed from the effective date of this ordinance through December 31, 1979, provided said ambulance vehicles fully comply as shown by inspections thereof performed in accordance with the provisions of this Section as to maintenance, on-board equipment, and supplies no fee shall be charged or collected by the Director for said inspection.

C. *Personnel Certification*: At lease one (1) EMT-Paramedic shall accompany every ambulance run, regardless of Code type, and at least one (1) EMT shall accompany every ambulance run, regardless of Code type, and the EMT-Paramedic, if only one EMT-Paramedic is involved on a given run, shall be the attendant in the patient compartment of the vehicle, and the other attendant, either EMT or EMT-Paramedic shall be qualified as a

"Driver", as defined in Section 18.195 of this Chapter. Further, any individual performing dispatching and system status management functions at the authorized EMS Control Center shall hold currently valid EMT certification beginning February 1, 1980; and beginning November 1, 1980 said individual(s) shall hold current and valid certification as "Dispatcher" issued pursuant to this ordinance and consistent with rules and regulations promulgated by the Director for the certification of Dispatchers, provided that such standards for dispatcher certification shall, effective November 1, 1980, require the passage by applicants of a written test approved by the Director and containing tests of didactic knowledge substantially equal to the written portion of the state test for certification of paramedics.

1. Applications for certification as Driver, EMT, EMT-Paramedic, or Dispatcher shall be made on such forms as may be described, prepared, or prescribed by the Director of Health, and shall contain such information as required in promulgated rules and regulations by the Health Department, and shall:

    a. Be accompanied by a certification of fifteen dollars ($15.00), payable annually, and such certification fee shall not be refundable if certification sought is not granted.

    b. Be submitted to the Director on such forms as may be directed or prescribed by the Director, and when received such application shall be referred to an emergency physician organization retained by the City for investigation, which may require such written and practical tests, and may require the applicant to perform certain procedures under the scrutiny of a licensed physician. Persons applying for per-

sonnel certifications must be competent in all skill areas as required in standards and regulations promulgated by the Health Department, and the criteria for certifications shall be competence in each and every skill area rather than a general grade for the entire range of required capabilities.

2. Qualified applicants shall be granted said certification upon determination by the Director that the requirements of Paragraphs 1 and 2, above, have been satisfied, and such certification shall be valid for a period of one (1) year from the date of issuance thereof, and the standards for renewal of personnel certification shall be the same as those applicable to any application for an initial certification at the time the renewal application is made.

3. Such certifications shall be subject to revocation or suspension by the Director at any time if such person is found to have falsified ambulance records, or to have been guilty of gross negligence in the performance of the skills required by this Chapter on a patient, or has willfully violated any of the provisions of this Chapter or standards or regulations adopted pursuant to this Chapter, or to have demonstrated an unwillingness or inability to perform patient care procedures in accordance with patient care protocols adopted by the physician advisory board and the Director. In addition, failure by any EMT to attend the scheduled medical audit proceeding involving a patient served by such EMT, after due notice of the time and place for such proceeding, will constitute grounds for revocation of the personnel certification of that

EMT, unless the failure to attend was the result of circumstances beyond the control of that EMT. Willful downgrading of a run code status from a higher priority code to a lower priority code than that which should reasonably have been assigned under the circumstances, or the finding by the physician advisory board of a persistent and chronic pattern of apparently accidental downgrading of presumptive code designations by a Dispatcher shall constitute falsification of ambulance records. Similarly, any attendant or driver found to have reported his status as having arrived at the scene of an emergency before the vehicle has actually arrived at such scene shall also be deemed to have willfully falsified ambulance records.

4. The Director shall allow every person currently certified as of the effective date of this ordinance in any capacity in ambulance service delivery, by the Director pursuant to Health Department Regulations HDR-AO-106 through 110 to continue to serve in that same capacity without additional certification requirements under this ordinance until January 1, 1980, at which time all previously issued ambulance personnel permits and certifications shall automatically expire and the new personnel certification requirements of this ordinance shall become mandatory.

5. Certification cards shall be carried on the person so certified at all times while on duty, and a copy of such certification card shall be kept on file at the central office of the licensed operator at all times.

6. Such personnel certifications shall be nonassignable and nontransferable.

Section 18.199. License Bond Required

No person or organization shall be granted a license to provide ambulance services within the City unless a license bond is obtained by the applicant, such bond issued by a firm licensed to do business in the State of Missouri, and in an amount not less than two hundred thousand dollars ($200,000), and such license bond shall be maintained for the duration of the period of the license. License bond shall be delivered to the Director in form and content as specified by and acceptable to the Director. Provided, however, that an ambulance operator licensee or license applicant under contract to the Public Trust shall be exempt from this license bond requirement.

Section 18.200. Duties and Powers of the Director of Health.

Under the provisions of this Article, the Director of Health, herein referred to as the Director, shall have the power to make such reasonable rules and regulations, orders and directions, and standards as may be necessary for carrying out the duties of his office, protecting the public health and safety, especially as are embodied in the principles underlying this ordinance, and as are not inconsistent with the provisions of this Article, and is hereby empowered and ordered to:

A. Develop, or cause to be developed, standards and rules governing at a minimum, but not limited to, the following areas associated with prehospital emergency medical services:

1. Standards and rules pertaining to personnel certification including competency testing standards and provisions for exceptions for the physically handicapped. Personnel certification standards

shall include those for EMT, EMT-Paramedic, Drivers, and Dispatchers.

2. Standards and rules governing ambulance vehicles, the on-board vehicle equipment and supplies, and maintenance of said rolling stock and equipment.

3. Rules defining various types of emergencies and nonemergencies, code designations, dispatching protocols, hospital selection protocols, and standards governing response time, including specification of response time standards by code type, subarea within the City, and allowable deviations from standards of response time.

4. Standards and rules governing medical audit procedures, vehicle inspection criteria, and medical control standards.

5. Standards and rules for collection of data and reporting such data.

6. "Dead-On-Arrival" procedures.

7. Standards and rules for advanced heavy rescue services.

8. Rules and procedures governing the interaction of emergency medical services personnel in the performance of their duties as related to other municipal services, such as fire and police.

9. Standards and rules for the operation of specialized mobile intensive care units as provided for in Section 18.202 hereof.

10. Standards and rules governing the advertisement of emergency ambulance telephone accessing procedures, and the operations of such emergency request receiving facilities.

B. Accept applications for all types of franchises, licenses, permits, and certifications issued pursuant to this ordinance, and to cause such investigation as he deems necessary to be made of the applicant and/or of his proposed operations, and to conduct such investigations and fact-finding through an emergency physician organization which shall be contracted to carry out those functions.

C. Issue ambulance licenses pursuant to this ordinance when he finds:

1. That the public convenience and necessity require the proposed ambulance service.
2. That the applicant is a responsible and proper person to conduct or work in such a service.
3. That only duly certified drivers and attendants are employed in such capacities.
4. That the applicant has been granted a franchise by the City.
5. That all requirements of this act and of the pertinent Health Department regulations and all other applicable laws and ordinances have been met.

D. Examine or cause to be examined all ambulance personnel applicants, as required by Health Department regulations.

E. Reinspect, re-examine, or cause reinspection or re-examination, within thirty (30) days prior to renewal of licenses or permits, for any and all of the requirements relative to the license to be renewed.

F. Revoke or cause the revocation of any franchise, license, permit, or certification issued pursuant to this ordinance, when there is due cause for such revocation. Permit holders wishing to appeal shall be granted an administrative hearing by the Director of Health of the City within thirty (30) days of request of such proceedings.

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Section 18.201. Standards for Ambulances, Ambulance Equipment, and Ambulance Service Premises.

A. Required equipment for each type of ambulance permitted hereunder shall be listed in the Health Department regulations by the Director of Health, who shall also judge the quality as well as quantity of such equipment.

B. Ambulance vehicle specifications shall be given in Health Department regulations by the Director of Health, who shall also assure compliance thereto and maintenance of such vehicles as required herein.

Section 18.202. Provision for Specialized Mobile Intensive Care Certification Unit Operator.

A. Specialized and mobile intensive care unit operator certifications may be issued to persons to provide specialized mobile intensive care patient transfer services, including specialized advanced life support interhospital transport service to and from Kansas City hospitals providing specialized care for defined patient-types on a regional basis. Applicants for specialized mobile intensive care unit operator certifications must be hospitals, departments of hospitals; or a licensed ambulance service, as defined herein. Applications should be submitted to the Director who shall refer applications to the physician advisory board for investigation and review, and for recommendation on disposition of such applications to the Director for approval or denial.

B. No fee shall be required for processing of applications for specialized mobile intensive care unit operator certification, or for issuance of such specialized mobile intensive care unit operator certification.

C. Applications for specialized mobile intensive care unit operator certification shall be made on such forms as may be described, prepared, or prescribed by the Director of Health, and shall contain such information as required in Health Department regulations promulgated pursuant to this ordinance.

Section 18.203. Continuous Physician Medical Control Required.

Each operator shall at all times have access to physician consultation and direction concerning the care of patients in the field, and such physician consultation shall be reliably available by radio communications, capable of functioning reliably even when the telephone service system is not functioning, and such physician consultation must be provided by a physician who has been found by the physician advisory board to be competent in the field of emergency medicine, and thoroughly familiar with the Kansas City EMS System and its operating protocols. In addition, the licensed operator must take steps to insure that physician consultation is routinely available to any ambulance personnel operating in the field within an average of not more than one (1) minute after ambulance personnel request such consultation.

Section 18.204. Response Time Performance Required.

A. A licensed operator, as a condition of maintaining its operator's license in good standing, shall employ such personnel, acquire such equipment, and manage its resources as necessary to the provisions of reliable emergency and nonemergency ambulance service throughout its entire primary area of responsibility as defined in its license in accordance with response time standards set forth herein, effective November 1, 1979:

1. Code 1 Standards: The operator shall achieve and maintain an average monthly response time for all calls presumptively designated as Code 1 calls received by the operator from within his primary area of responsibility (except as exempted from this standard as provided for in Paragraph C of this section, below) and such Code 1 average response time shall be not more than five and one-half (5-1/2) minutes or less, with not more than five percent (5%) of all presumptively designated Code 1 calls per month in excess of eight and one-half (8-1/2) minutes.

2. Code 2 Standards: The operator shall achieve and maintain an average monthly response time for all calls presumptively designated as Code 2 calls received by the operator from within his primary area of responsibility (except as exempted from this standard as provided for in Paragraph C of this section, below) and such Code 2 average response time shall be not more than seven (7) minutes or less, with not more than ten percent (10%) of all presumptively designated Code 2 calls per month in excess of twelve (12) minutes.

3. The operator's response to Code 3 calls shall be reasonable, but in every case where a conflict occurs, response to Code 1 and Code 2 calls shall take precedence over response to Code 3 calls.

4. The operator shall maintain, for each of the six councilmanic districts of the City of Kansas City, Missouri, monthly response time averages for Code 1 calls of seven (7) minutes or less, and for Code 2 calls an average response time of eight and one-half (8-1/2) minutes or less.

B. For purposes of this section, the designation of a run as Code 1, Code 2, or Code 3 shall be made by the EMS Control Center personnel at the point of dispatch on a presumptive basis, and no retrospective alteration of such designation shall be allowed except that runs originally designated as Code 2 or Code 3 may be retrospectively redesignated by the Director for purposes of response time calculation as a more time-critical run type if the Director disputes the designation, and if it is the independent judgment of that emergency physician organization retained by the City to perform medical audits that such original designation was improper, given the information available to the EMS Control Center personnel at the time of the presumptive designation of Code type.

C. For purposes of calculating the operator's response time performance on calls from within his designated primary area of responsibility, the Director shall disregard response times to calls which occur under conditions which, in the opinion of the Director, are unusual and which present response time performance barriers to the operator which are unusual and beyond his control. Provided, however, that it is hereby stipulated that any call received by the operator at a time when that operator is simultaneously engaged in active response to nine or more runs within his own primary area of responsibility shall be exempt from response time performance calculations. That is, the first nine runs occurring at such times shall *not* be exempt from such calculations, but the tenth call and subsequent calls shall be exempt so long as nine calls remain in progress simultaneously. Further conditions which may be deemed by the Director to present unusual circumstances beyond the control of the operator include unusually severe weather conditions, a short-term communications system breakdown beyond the reasonable control of the operator, and an unusual concentration of

prank calls to the operator tying up large segments of the operator's response capability. Furthermore, the Director shall insure that valid techniques of statistical analysis are employed in calculating response time performance, and that in the event an insufficient volume of calls renders it impossible to make any response time performance determination reliable at the ninety-five percent level of confidence, that particular performance standard shall be considered to have been met by the operator, or, at the Director's option, the Director may require the accumulation of additional months of data until sufficient runs have accumulated to allow a determination at the ninety-five percent level of confidence for a time period in excess of one (1) month.

D. Chronic poor response time performance by any operator shall be grounds for suspension or revocation of the operator's license by the Director on the recommendation of a two-thirds majority vote of the physician advisory board that the operator's poor performance was not the result of unusual or unpredictable circumstances of weather or disaster situation, and said board has found that the operator's poor performance has unnecessarily threatened public health and safety and that the operator's license should, in the opinion of a two-thirds majority of the physician advisory board, be suspended or revoked.

Section 18.205 Requirement for Approval of Operator Rate Schedule.

The operator shall submit to the Director the schedule of fees which the operator proposes to charge for ambulance services rendered under this ordinance. In support of the proposed fee schedule, the operator shall also present financial information concerning the operator's costs and revenues in a format prescribed by the Director and certified in a manner acceptable to the Director. In the

event the operator is a new operator without a history of costs and revenues, the operator shall present pro forma financial information in the same required format. The information so provided shall be reviewed by the Director and his recommendations concerning the fairness and adequacy of the proposed schedule shall be referred to the Council. The fee schedule and any changes made therein must be approved by the Council before it becomes effective. Any fee schedule so approved shall be approved for a period of one (1) year, and at the end of that period the operator shall present to the Director a new proposed fee schedule, plus such additional audited financial information as may be required by the Director, and in the format required by the Director, and this information shall again be reviewed by the Director for recommendation to the Council which must approve the new fee schedule before it may become effective; provided, however, that should there be a delay in obtaining approval on any new fee schedule, an operator who has previously been operating under an old fee schedule may continue to bill in accordance with the old fee schedule until a new fee schedule is approved. Provided, however, that an operator may apply quarterly for interim fee schedule adjustments based strictly upon actual inflation in the cost to the operator of various factors of production and such request may be approved by the Council only if it is determined that such increased costs are reasonably consistent with the overall inflation in such costs in the nation as a whole.

Section 18.206. Mandatory Centralized Dispatch and EMS Control.

A. Because of the regular need for coordinated interaction among police, fire, and ambulance service systems during emergency situations, and especially under

disaster condiitons, it is hereby required that all ambulances rendering service under this Chapter shall be dispatched and controlled from an EMS Control Center designated by the City. It shall be unlawful for any operator or organization to publish or advertise any telephone number for the purposes of receiving requests for emergency ambulance service except the emergency number of the EMS Control Center. Provided, however, that an operator may maintain his own telephone number for the purposes of receiving calls for nonemergency runs only, provided said operator shall make provision for allowing the EMS Control Center to monitor, and to know at all times, the whereabouts of vehicles dispatched for nonemergency purposes. In the event a request for an emergency run inadvertently comes to said operator's nonemergency-only line, said operator shall switch such calls to the EMS Control Center immediately and without interruption of the call to the EMS Control Center.

B. For any operator receiving centralized dispatch services from the EMS Control Center, the operator in charge of the Control Center shall prepare a quarterly analysis of EMS Control Center operating costs per run dispatched, and shall bill to each operator the actual cost of such dispatches to the operator, and each operator shall make payment to the Control Center operator within thirty (30) days after receipt of billing, as a condition of maintenance of the operator's license in good standing.

C. The EMS Control Center shall at all times have full authority to direct the positioning, movements, and run responses of all manned ambulance units at all times.

D. In the event two or more operators are simultaneously licensed to conduct ambulance business within the City of Kansas City, Missouri, the Director shall develop and enforce additional rules and regulations govern-

ing the conduct of dispatching from the EMS Control Center, and such rules and regulations for dispatching shall have the effect of insuring:

1. That the most effective utilization of all resources available within the community is achieved so that the best possible response times are realized for every emergency call regardless of which operator's primary area of responsibility the call originated from, and regardless of which operator's ambulance unit was dispatched; and

2. No operator is given a consistent financial advantage over another operator through the deliberate assignment of runs or positioning of operator's units in preparation for response.

Section 18.207. Mandatory EMS Data System and Reporting.

A. As a condition of maintaining a license in good standing, the licensee shall comply with EMS data system and reporting standards as prescribed by the Director. Such standards and reporting requirements shall include, but not be limited to:

1. Accurate and timely reporting to the EMS Control Center concerning the location and status of all ambulances.

2. Use of approved code structures and numbering conventions.

3. Use of approved run report forms on every dispatched run, routine and emergency, transport, or no-haul, one (1) copy of which is to be left with the emergency receiving facility upon delivery of the patient, and another copy of which shall be

provided to the Public Trust for data entry and later analysis by the Director. Said run report forms shall be compiled and sorted monthly in accordance with submission requirements of the Director, and shall be delivered to the Public Trust within ten (10) days after the close of the calendar month for which the runs have been compiled. Alternative plans for more timely data submission may be negotiated with Public Trust at the operator's option.

4. For nonemergency runs which were not dispatched by the EMS Control Center, operator shall utilize a dispatch report form approved by the Director.

5. Operator shall maintain, compile, and submit to the Public Trust such additional reports concerning maintenance, salary schedules, employee utilization—both active and on-call—and such other information as may be requested by the Director in order to better monitor operator performance.

B. Failure to comply with data system and reporting requirements, or to keep the EMS Control Center completely informed concerning the location and status of all units at all times, or failure to carry out EMS Control Center directives shall constitute grounds for suspension or revocation by the Director of the license.

Section 18.208. Standards for Insurance.

A. No ambulance service license shall be issued under this ordinance, nor shall such license be valid for issuance, nor shall any ambulance be operated in the City unless there is at all times in force and effect insurance coverage, in an amount of at least one hundred thousand dollars ($100,000) for injury to, or death of, one person, by reason

of carelessness or negligence of the driver of such ambulance, and three hundred thousand dollars ($300,000) for injury to, or death of, more than one person, resulting from a single accident, by reason of the carelessness or negligence of the driver of such ambulance, and fifty thousand dollars ($50,000) for damage to the property resulting from any single accident, by reason of or carelessness or negligence of the driver of such ambulance, issued by an insurance company licensed to do business in the State of Missouri, for each and every ambulance owned and/or operated by or for the applicant or licensee, providing for the payment of damages:

1. For injury to or death of individuals in accidents resulting from any cause for which the owner of said vehicle would be liable on account of liability imposed in him by law, regardless of whether the ambulance was being driven by the owner or his agent; and

2. For loss of or damage to the property of another under like circumstances.

B. Insurance to cover errors and omissions on the part of operator's employees for a limitation of each claim of not less than five hundred thousand dollars ($500,000).

C. Said insurance policy shall be submitted to the Director of Health for approval prior to issuance of each ambulance license. Satisfactory evidence that such insurance is at all times in force and effect shall be furnished to the Director of Health, in such forms as he may specify, by all licensees required to provide such insurance under provisions of this act.

D. Every insurance policy required hereunder shall contain a provision for continuing liability hereunder to the full amount thereof, notwithstanding any recovery

thereon, that the liability of the insurer shall not be affected by the insolvency or the bankruptcy of the assured, and that until the policy is revoked or expires the insurance company will not be relieved from liability on account of nonpayment of premium, failure to renew license at the end of the year, or any act or omission of the named assured. Such policy of insurance shall be further conditioned for the payment of any judgments up to the limits of said policy recovered against any person other than the owner, his agent or employee, who may operate the same with the consent or acquiescence of the owner.

E. Every insurance policy required hereunder shall extend for the period to be covered by the license applied for and the insurer shall be obligated to give not less than thirty (30) days written notice to the Director and to the assured before any cancellation or termination thereof earlier than its expiration date and the cancellation or other termination of any such policy shall automatically revoke and terminate the permits and license issued and covered by such policy, unless other insurance policy complying with the provisions of this section shall be provided and be in effect at the time of such cancellation and termination.

Section 18.209. Provision for Investigation of Consumer Complaints.

The Director and the physician advisory board shall establish and make known to the public procedure for formal investigation of consumer complaints, and operator shall cooperate fully with such investigation, and each operator shall instruct his employees to cooperate fully with such investigation, and shall answer, in writing, if requested, any inquiries by the Director in regard to such investigations. The Director may, at his option, instruct

the staff of Public Trust to conduct such investigations on his behalf.

Section 18.210. Provision for Standards and Regulations.

A. Standards and regulations necessary to the administration of this Chapter and periodic changes thereto shall be developed by the physician advisory board and shall be adopted by the Director.

B. Standards and regulations adopted by the Director pursuant to this Chapter shall be compiled in the form of a book of "EMS Standards and Regulations."

Section 18.211. Prohibition Against Refusal to Transport on Emergency Calls.

It shall be a violation of this ordinance to fail to respond to a call for transport or render first aid treatment as is necessary or otherwise refuse or fail to provide any emergency services within the scope of the ambulance operations because of the patient's demonstrated or stated inability to pay for such services, because of the location of the patient within the city limits of the City, or because of the status of an operator's ambulance units available at the time of the dispatch.

Section 18.212. Failure to Pay for Services and Abuse of Services.

A. Any person who has been provided ambulance services under provisions of this ordinance shall be expected to make satisfactory arrangements with the operator to pay for such services within ninety (90) days from the date of provision of the service. If such arrangements have not been made with the operator within the

time specified, it shall be considered prima facie evidence of intent to defraud, and such person shall be guilty of an offense, and upon conviction thereof shall be punishable by a fine of not more than one hundred dollars ($100.00) and imprisonment in the city jail of not more than thirty (30) days, or any combination of both such fine and imprisonment.

B. Any person who knowingly and willfully gives false information to the EMS Control Center in order to induce the Control Center to direct the actions of the EMS system in any manner which would be considered inappropriate if the Center were given accurate information concerning the situation in question shall be guilty of an offense, and upon conviction thereof shall be punishable by a fine not to exceed one hundred dollars ($100.00) and by imprisonment in the city jail not to exceed thirty (30) days, or any combination of both such fine and imprisonment.

Section 18.213. Physician Advisory Board Created.

There is hereby created a physician advisory board which shall exercise the powers vested in it and which shall be responsible for the performance of the responsibilities delegated to it by the provisions of this Chapter. The physician advisory board shall consist of five (5) members appointed by the Mayor and who are members of the then-current Board of Directors of the emergency physician organization contracted by the City to conduct its quality control functions. Each member of the physician advisory board shall hold such office until his successor is appointed and qualified. All members shall serve without compensation and shall be licensed physicians regularly engaged in the practice of emergency medicine in the Kansas City area and shall also be Board members

of the emergency physician organization retained by the City. No member's term of office on the physician advisory board shall exceed his membership on the Board of Directors of the emergency physician organization discussed above.

Section 18.214. Penalties for Violation.

A. Any person violating, or failing to comply with, the provisions of this ordinance and the applicable provisions hereof shall be deemed guilty of an ordinance violation and upon conviction thereof shall be fined an amount not less than fifty dollars ($50.00) and no more than five hundred dollars ($500.00), or imprisoned for a period not exceeding thirty (30) days, or both such fine and imprisonment, for each offense.

B. Each day that any violation of, or failure to comply with, this act is committed or permitted to continue shall constitute a separate and distinct offense under this section and shall be punishable as such hereunder; provided, however, that the court may, in appropriate cases, stay the accumulation of penalties.

Section 18.215. Franchise Privilege Fees.

A. While there are no fees charged for the processing of ambulance service franchise applications or for the issuance of a franchise authorization by the Director, pursuant to this ordinance, franchisees shall be encouraged to maintain a high level of emergency response time performance and to diligently comply with data collection and reporting standards through the application of the following fee structure, the proceeds from which shall be utilized by the City toward improvement of emergency health care for all its citizens:

1. For each minute, or part thereof, of excessive response time to a Code 1 call, the operator shall be assessed by the Director a fee of ten dollars ($10.00), not to exceed one hundred dollars ($100.00) per run. Excessive response time for a Code 1 run is hereby stipulated any time in excess of eight and one-half (8-1/2) minutes response time.

2. For each minute, or part thereof, of excessive response time to a Code 2 call, the operator shall be assessed by the Director a fee of five dollars ($5.00), not to exceed fifty dollars ($50.00) per run. Excessive response time for a Code 2 run is hereby stipulated any time in excess of twelve (12) minutes response time.

3. For every request for ambulance service received by the operator for which the operator failed to supply a completed dispatch report form *and* a completed run report form, the operator shall be assessed by the Director a fee of seventy-five dollars ($75.00).

B. Runs with excessive response times which were exempt under this ordinance from inclusion in response time analyses, as provided for in Section 18.204, Paragraph C, shall also be exempt fee assessment as provided for in this Section.

C. The provisions of this ordinance exempting a licensed operator retained by the Public Trust notwithstanding, the provisions of this Section regarding franchise fee assessment and payment shall apply to such an operator retained by the Public Trust as though such operator were a franchisee, and the Public Trust shall, upon receipt of a monthly assessment from the Director, deduct the full

amount of such fees from its monthly payment to that operator, and shall make payment to the City on behalf of that operator, and shall include these provisions within its contract with said operator.

D. Data submitted to the Public Trust by an operator and the monthly statistical analyses of such data prepared by the Director shall serve as prima facie evidence of the occurrence or lack of occurrence of emergency runs with excessive response times as defined in this Section.

E. Each franchisee shall make payment to the City in full for fees assessed under this Section within ten (10) days after receipt of such assessment, but shall have the right to appeal each and every incidence of such assessment to the physician advisory board, whose decision on the matter shall be final. In the event the physician advisory board determines that such a fee was improperly assessed the City shall reimburse the operator as appropriate within thirty (30) days after the receipt of the decision on the matter by the physician advisory board.

Section 18.216. Special Provisions.

A. *Appeal.* Any applicant and/or protestant shall have the right to appeal any action taken by the Director, the EMS Control Center Operator, the emergency physician organization retained by the City, Public Trust, or the physician advisory board, relating to the issuance, denial, revocation, alteration, or suspension of the franchise operator license, personnel certification, or vehicle permit to the Council by filing with the Public Trust within ten (10) days from the date of said order a written notice of appeal; said notice shall set forth the grounds for the appeal. The City Council may, after a hearing, sustain, reverse, or modify the action being appealed.

B. *Conflict of Interests.* It shall be unlawful to be employed or act as an ambulance driver or EMT attendant while simultaneously being employed by or representing any other firm or individual engaged in the provision of the usual services of a funeral home, mortuary, or undertaking concern.

C. *Patient Management in Medical Emergency and Management of the Scene of a Medical Emergency.* Authority for patient management in a medical emergency shall be vested in that licensed physician or EMT attendant at the scene of the emergency who has the most training specific to the provision of emergency medical care. If a licensed physician or EMT is not available, the authority shall be vested in the most appropriately trained representative of other public safety agencies who may have responded to the emergency. Authority for the management of the scene of a medical emergency shall be vested in appropriate public safety agencies. The scene of a medical emergency shall be managed in a manner designed to minimize the risk of death or health impairment to the patient and to other persons who may be exposed to the risks as a result of the emergency condition, and priority shall be placed upon the interests of those person exposed to the more serious remediable risks to life and health. Public safety officials shall ordinarily consult emergency medical services personnel or other authoritative medical professionals at the scene in the determination of relevant risks.

D. *Emergency Operation of Vehicle.* It shall be unlawful to operate an ambulance as though emergency conditions exist, when the driver knows or should have reason to know such conditions do not exist.

E. *Unlawful Practice.* It shall be unlawful for any operator, driver, or EMT attendant to administer, prescribe,

employ, or sell any drug, herb, medicine, or treatment device or attempt the treatment of disease, except as provided herein.

F. *Prohibition Against Willful Downgrading of Code Status.* Willful downgrading of presumptive run code designations by the operator shall constitute grounds for suspension or revocation or refusal to renew an operator license. Any instance in which it is discovered that operator's management or supervisory personnel have encouraged a dispatcher to downgrade any presumptive code designation shall constitute "willful downgrading" on the part of the operator. Any alterations of the original entry of the presumptive code designation by anyone in operator's employ shall also constitute "willful downgrading" on the part of the operator. In addition, should the physician advisory board find that there is a chronic and persistent pattern of error in presumptive code assignment by operator's dispatchers, and such pattern is persistently in the direction of downgrading, as opposed to upgrading errors, and such pattern continues in the opinion of the physician advisory board for three months or more, then the existence of such pattern, as determined by the PAB shall constitute prima facie evidence of willful downgrading on the part of the operator. Cooperation on the part of a dispatcher in such willful downgrading activities shall also constitute grounds for revocation of that dispatcher's certification as a dispatcher, Basic EMT, and/or EMT-Paramedic.

G. *Professional Conduct.* Drivers and EMT' attendants operating under this Chapter shall at all times conduct themselves in a professional manner, as generally described in rules of professional conduct which shall be written and compiled by the physician advisory board and which shall be made available to all holders of pro-

fessional certifications at the time such certification is issued.

H. *Effective Dates.* All sections of this Chapter shall be in full force and effect on and after November 1, 1979, except those which specifically state otherwise.

I. If any section, subsection, sentence, clause, phrase, or portion of this ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction such portion shall be deemed a separate, distinct, and independent provision, and such holding shall not affect the validity of the remaining portions hereof.

Section B. This ordinance, making provision for the immediate preservation of the public health and safety, is declared to be an emergency measure within the meaning of Section 15, Article II of the Charter and shall take effect immediately upon passage.

Approved as to form and legality:

/s/ Richard Munro
Assistant City Attorney

Authenticated as Passed

.....
Richard L. Berkley, Mayor

/s/ E. Richard Brenneman,
City Clerk

By .....
Deputy City Clerk

September 6, 1979

Form 1907a - Law

COMMITTEE SUBSTITUTE FOR ORDINANCE 50983
AN ORDINANCE

AMENDING CHAPTER 18, CODE OF GENERAL ORDINANCES, "HEALTH AND SANITATION", BY REPEALING SECTIONS 18.195 THROUGH 18.216, ARTICLE X, THEREOF, RELATING TO THE REGULATION OF AMBULANCES, TO POSTPONE UNTIL FURTHER ACTION BY THE COUNCIL IMPLEMENTATION OF THE MANAGEMENT EMBODIED IN THE ORDINANCE HEREBY REPEALED, AND TO REINSTATE PROVISIONS OF THE AMBULANCE ORDINANCE AND REGULATIONS IN EFFECT IMMEDIATELY PRIOR TO NOVEMBER 1, 1979, AND TO EFFECT AN UPGRADING OF CERTAIN STANDARDS OF PERFORMANCE AND PUBLIC ACCOUNTABILITY BY: REQUIRING AT LEAST ONE TYPE I ATTENDANT ON EVERY AMBULANCE RUN, EMERGENCY AND NONEMERGENCY; INSTITUTING ADDITIONAL MEDICAL ACCOUNTABILITY BY ESTABLISHING A PHYSICIANS ADVISORY BOARD AND BY AUTHORIZING THE DIRECTOR TO ENGAGE BY CONTRACT AN EMERGENCY PHYSICIANS ORGANIZATION TO PERFORM CERTAIN MEDICAL AUDIT AND INSPECTION FUNCTIONS; REQUIRING RESPONSE TIME PERFORMANCE OF AMBULANCE LICENSES; AND PROHIBITING THE PRACTICE OF CERTAIN BUSINESS PRACTICES FOUND DETRIMENTAL TO THE PUBLIC HEALTH AND SAFETY AS DEFINED HEREIN, SUCH PRACTICE GENERALLY CHARACTERIZED BY THE TERM "CREAM SKIMMING ACTIVITIES"; AND DECLARING AN EMERGENCY.

WHEREAS, the Council previously adopted for implementation the EMS "public utility" model as its man-

agement strategy for regulating and insuring the availability of quality ambulance services throughout all parts of the City of Kansas City, Missouri, as generally embodied in the ambulance ordinance (50775) repealed hereunder; and

WHEREAS, the Council has discovered the existence of certain temporary impediments to the full scale implementation of the EMS "public utility" management structure, particularly an uncertain timetable for the obtaining of State ambulance services license to be held by the City's Metropolitan Ambulance Services Trust, hereinafter referred to as the "Public Trust"; and

WHEREAS, the Council finds and determines that, until these issues regarding state licensure are resolved, there is an immediate need for reinstitution of ordinance provisions and regulations in effect immediately prior to November 1, 1979, with additional requirements for increased performance and public accountability; and

WHEREAS the Council finds and determines that the within ordinance, having to do with the safety, health and welfare of the citizens of Kansas City, Missouri, is declared to be an emergency ordinance and should take effect upon passage, NOW, THEREFORE,

BE IT ORDAINED BY THE COUNCIL OF KANSAS CITY:

Section A. That Chapter 18, Code of General Ordinances, "Health and Sanitation", is hereby amended by repealing Sections 18.195 through 18.216, Article X, thereof, relating to the regulation of ambulances, and by enacting in lieu thereof a new Article X entitled "Ambulance System Code" containing the following new or revised numbered sections:

ARTICLE X. AMBULANCE SERVICE

Section 18.195. Definitions.

For the purposes of this article, the following terms, phrases, words and their derivations shall have the meaning given herein. When not inconsistent with the context words used in the present tense include the future, words used in the plural include the singular, and words used in the singular include the plural. The word "shall" as used herein is not merely directory but is considered mandatory.

Unless otherwise specified, the following terms are defined:

(a) *Ambulance*: Any motor vehicle constructed, reconstructed, arranged, equipped, used or meant for use of transporting ill, injured or otherwise incapacitated persons from one place to another.

Type 1: A specially constructed and equipped ambulance type emergency vehicle, having a current emergency vehicle permit issued by the Board of Police Commissioners of Kansas City, if privately owned, capable of providing life support to patients with life-threatening conditions, for extended periods of time if necessary.

Type II: An ambulance type emergency vehicle, having a current emergency vehicle permit issued by the Board of Police Commissioners of Kansas City, if privately owned, constructed and equipped to provide safe transportation and reasonable care of persons suffering from trauma and illness.

(b) *Ambulance Service*: Any business or service established to transport patients [see (o) below] from one place to another within the City.

(c) *Apprentice Attendant*: A person desiring to become a licensed attendant who, for a period of time, is in training and not yet fully eligible for licensure as an attendant.

(d) *Apprentice Driver*: A person desiring to become a licensed driver who, for a period of time, is in training and not yet fully eligible for licensure as a driver.

(e) *Attendant*: Any individual who is responsible for the care of a patient within an ambulance vehicle.

(f) *City*: Kansas City, Missouri.

(g) *Driver*: Any individual who operates or attempts to operate an ambulance vehicle on the streets, alleys, or other public thoroughfares within the corporate limits of Kansas City, Missouri.

(h) *Driver-Attendant*: Any person qualified and lisensed as both driver and attendant pursuant to the terms of this article.

(i) *Emergency Physician Organization*: Any nonprofit organization composed of and controlled by licensed physicians who are all regularly engaged in the professional practice of emergency medicine in Kansas City, Missouri, whose membership may not prohibit any qualified physician from becoming a member, which has a Board of Directors of not less than seven (7) members, and which provides for non-voting associate members who are not physicians regularly engaged in the practice of emergency medicine.

(j) *EMS Control Center*: Any location designated by the Director which shall serve as an emergency operations center for emergency medical services dispatching and system control.

(k) *Life-Threatening Emergency*: Means by way of illustration and not by way of exclusion any one or more of the following:

Acute respiratory distress, shock, airway blockage, bleeding beyond control, acute poisoning, acute cardiovascular distress, or central nervous system injury.

(l) *Metropolitan Ambulance Services Trust (Public Trust)*: A Trust created for use and benefit of Kansas City, Missouri that is empowered by the City to take such steps as necessary to insure the availability of quality emergency medical services to the citizens of Kansas City, Missouri.

(m) *Operator*: Any person, firm, or corporation engaged in the business of providing routine transfer and emergency ambulance services holding a valid operator's license, as defined herein, issued by the City.

(n) *Operator's License*: An ambulance service permit issued by the Director under this ordinance and authorizing the holder to operate an ambulance service in the City in accordance with standards and regulations required by this ordinance.

(o) *Patient*: Any person who is ill, injured, or otherwise incapacitated or helpless and who requires and/or requests ambulance services.

(p) *Person*: Any natural person, firm, partnership, copartnership, association, corporation, company, or group of individuals acting together for a common purpose of organization, or other organizations of any kind or character.

(q) *Physician Advisory Board*: That Board created by this ordinance which is composed of five (5) li-

censed physicians, appointed by the Mayor, and who are members of the then-current Board of Directors of the Emergency Physician Organization contracted by the City to conduct its quality control functions.

(r) *Police*: Duly authorized members of the Police Department of the City of Kansas City, Missouri.

(s) *Presumptive Run Designation—Code 1*: Any ambulance service request wherein a reasonable person under the circumstances would have reason to believe, from information obtained from the person requesting service in the course of an information-gathering conversation conforming to approved dispatcher protocols, that a time-critical, life-threatening emergency situation may exist at the scene.

(t) *Presumptive Run Designation—Code 2*: Any ambulance service request wherein a reasonable person under the circumstances would have reason to believe, from information obtained from the person requesting service in the course of an information-gathering conversation conforming to approved dispatcher protocols, that an emergency medical condition exists at the scene for which prompt response is appropriate for medical and humanitarian reasons, but that such situation apparently involves no immediate threat to human life of a time-critical nature.

(u) *Presumptive Run Designation—Code 3*: Any ambulance service request wherein a reasonable person under the circumstances would have reason to believe, from information obtained from the person requesting service in the course of an information-gathering conversation conforming to approved dis-

patcher protocols, that the request is for nonemergency transportation of a person whose apparent condition could not appropriately be presumptively defined as either Code 1 or Code 2.

(v) *Primary Area of Responsibility*: That area of the City assigned to an Operator, as defined in his ambulance service license, for which that licensee, as a condition of licensure, accepted sole responsibility for providing emergency and nonemergency ambulance services in accordance with response time and other performance standards required under this ordinance and its regulations. A primary area of responsibility may include one or more councilmanic districts and shall be of sufficient size and demographic makeup that the financial stability of the licensee serving such area is not threatened by a lack of economy of scale or by the concentration of collection problems in any single assigned area, as determined by the Director. Nothing in this ordinance shall be construed to prohibit the inclusion of the entire City in a single assigned primary area of responsibility, if the Director finds that such assignment is in the best interests of the City.

(w) *Response Time*: The actual elapsed time, measured in minutes and seconds, between close of receipt of notification of the EMS Control Center that the ambulance is needed at a location and the arrival of the ambulance at the location specified by the EMS Control Center.

(x) *Retrospective Run Designation—All Codes*: The run code designation assigned to a run by the Senior EMT In Charge after direct physical contact with the patient. Such retrospective designations may properly differ from prospectively assigned run code des-

ignations on a given run, but shall not serve to alter the original presumptive run code assignment.

Section 18.196.1. Licenses Required.

(a) *Ambulance Service*: No person either as owner, agent, or otherwise shall furnish, operate, maintain, advertise, or otherwise be engaged in or profess to be engaged in the business or service of the transportation of patients upon the streets, alleys, public ways or places within the City, unless he holds a currently valid license for an ambulance service issued pursuant to this ordinance.

(b) *Ambulance*: No ambulance shall be operated, and no individual shall drive nor attend it on the streets, alleys, or any public way or place of the City, unless it shall be currently licensed as an ambulance—Type I or Type II, pursuant to this ordinance.

(c) *Ambulance Personnel*: No person shall be employed nor otherwise permitted to drive, attend, or drive and attend ambulances subject to this ordinance, unless he shall hold currently valid license as an attendant, driver, or driver-attendant, or an apprentice license for such positions, issued pursuant to this ordinance.

(d) *Exceptions*: Licenses shall not be required for ambulance services, ambulances, or drivers, attendants, and driver-attendants of such ambulances, which are:

(1) Owned and operated by an agency of the United States Government.

(2) Rendering requested assistance to ambulances currently licensed in cases of disaster or major emergency too great for local resources; or in response to the provisions of written community "Mutual Aid Agreements."

(3) Operated from a location or headquarters outside the City and transporting patients who are picked up outside the limits of the City to locations within the City, or through the City to other locations.

(4) Ambulances picking up patients within the corporate limits of the City, are not exempt under this section, regardless of the destination of the patients, or the location of the headquarters of the ambulance service, unless qualified for exemption under this Subsection (d) (Ordinance 39296, 3-5-71)

(5) Licensed in accordance with ordinances or statutes of like content, such license being issued by a political subdivision of the State of Missouri which is contiguous to the Kansas City Missouri corporate limits. Also, a written agreement between the licensing officers of the two jurisdictions allowing for such exception must be in effect. The City of Kansas City, Missouri, shall retain all rights to inspection as provided in Article X, Sections 17.195-18.206 revised statutes, Kansas City, Missouri. Any service, vehicle, or individual, desiring such exception must request said exception in writing accompanied by copies of current licenses, and submit to an initial inspection.

Section 18.196.2 Application for Permits.

(a) *Ambulance Services*: Applications for ambulance service permits hereunder shall be made on such forms as may be described, prepared, or prescribed by the Director of Health, and shall contain such information as required in Health Department Regulation HDR-AO-101.

(1) A permit fee of $35.00, payable annually, shall accompany each application.

(b) *Ambulances:* Applications for ambulance permits hereunder shall be made on such forms as may be described, prepared or prescribed in Health Department Regulations HDR-AO-102, HDR-AO-103 and/or HDR-AO-103 and/or HDR-AO-104.

(1) A permit fee of $175.00, payable annually, shall accompany the application of Ambulance Type I permits.

(2) A permit fee of $175.00, payable annually, shall accompany the application of Ambulance Type II permits.

(c) *Ambulance Personnel:* Applications for permits as attendant, apprentice attendant, driver, apprentice driver, and/or driver-attendant shall be made on such forms as may be described, prepared or prescribed by the Director of Health, and shall contain such information as required in Health Department Regulations HDR-AO-106, HDR-AO-107, HDR-AO-108, HDR-AO-109, and HDR-AO-110.

(1) A permit fee of $15.00, payable annually shall accompany each application for an attendant's permit.

(2) A permit fee of $15.00, payable annually shall accompany each application for an apprentice attendant's permit.

(3) A permit fee of $15.00, payable annually shall accompany each application for a driver's permit.

(4) A permit fee of $15.00, payable annually shall accompany each application for an apprertice driver's permit.

(5) A permit fee of $15.00, payable annually shall accompany each application for a driver-attendant's permit.

(d) *Permit Renewal*: Each permittee shall be notified 60 days prior to the expiration of current permit, that such permit(s) shall expire. It shall be the responsibility of the permittee to apply for renewal if desired. Permits are not renewed automatically, and application for renewal shall be received by the Health Department not less than 30 days prior to expiration to assure continuity.

(e) *Permit Transfer Illegal*: No permit, issued pursuant to this ordinance, shall be transferred to another ambulance service, ambulance driver, attendant or driver-attendant or the prospective apprentices. Such permits used by persons other than those to whom originally issued shall be considered invalid immediately as to the unauthorized holder and subject to revocation by the Director of Health, as to the original permittee.

(f) *Refund of Permit Fees*: Permit fees submitted with applications shall not be refunded to the applicant should the license not be issued. Permit fees shall not be refunded if permits are revoked by the Director of Health.

Section 18.196.3 Standards for Permits

(a) Each ambulance service shall at all times when providing ambulance service within the City:

(1) Be managed by a person of good character, who holds a currently valid driver-attendant permit issued pursuant to this ordinance; or, if the manager is not the holder of a permit as a driver-

attendant, there shall be a chief driver-attendant who holds a currently valid driver-attendant permit issued pursuant to this ordinance, who is capable of supervising other ambulance personnel.

(2) Maintain such records pertaining to the provision of ambulance services as may be required by the Director of Health.

(3) Permit reasonable inspection of the premises, ambulances, and of ambulance personnel by duly authorized representatives of the Director of Health during normal hours of business.

(b) Each ambulance (Type I and Type II) shall at all times when in use as such:

(1) Be suitable from the standpoint of health, sanitation, and safety for the transportation of patients and shall be maintained on suitable premises.

(2) Contain equipment conforming with the standards given for the specific type of permit, in Health Department Regulations HDR-AO-111, HDR-AO-112, and/or HDR-AO-113, as applicable, as determined by the Director of Health.

(3) Currently comply with motor vehicle safety requirements of the U.S. Government, the State of Missouri, and the City.

(4) Be equipped with such audible and visual warning devices and/or special markings to designate it as an ambulance as may be prescribed by the Director of Health by regulation HDR-AO-105.

(5) Be equipped with approved seat belts for the driver, attendant, and any passenger seats, and an approved restraining device for the ambulance litter and patient.

(6) In addition to its driver-attendant, have at least one (1) Type I Attendant accompany every ambulance run, regardless of code type.

(7) Meet standards for on-board equipment and supplies for Type I Mobile Emergency Units required by standards and regulations, that is, the on-board equipment requirements for a Type II vehicle shall not be less than that required for a Type I vehicle.

(c) Standards for permits for all ambulance personnel are given in Health Department Regulations, as listed below, and as amended by the Director of Health.

HDR-AO-106 Attendants (Type I and Type II)

HDR-AO-107 Apprentice Attendant

HDR-AO-108 Driver

HDR-AO-109 Apprentice Driver

HDR-AO-110 Driver-Attendant

Section 18.196.4 Standards for Ambulance Service Permit-Liability Insurance

(a) No ambulance service permit shall be issued under this act, nor shall such permit be valid for issuance, nor shall any ambulance be operated in the City unless there is at all times in force and effect insurance coverage, in an amount of at least $50,000 for injury to, or death of, one person, by reason of the carelessness or negligence of the driver of such ambulance, and $100,000 for injury to, or death of, more than one person, resulting from a single accident, by reason of the carelessness or negligence of the driver of such ambulance, and $10,000 for damage to property resulting from any single accident, by reason

of the carelessness or negligence of the driver of such ambulance, issued by an insurance company licensed to do business in the State of Missouri, for each and every ambulance owned and/or operated by or for the applicant or licensee, providing for the payment of damages:

(1) For injury to or death of individuals in accidents resulting from any cause for which the owner of said vehicle would be liable on account of liability imposed in him by law, regardless of whether the ambulance was being driven by the owner or his agent; and

(2) For the loss of or damage to the property of another under like circumstances.

(b) Said insurance policies shall be submitted to the Director of Health for approval prior to the issuance of each ambulance license. Satisfactory evidence that such insurance is at all times in force and effect shall be furnished to the Director of Health, in such form as he may specify, by all licensees required to provide such insurance under the provisions of this act.

(c) Every insurance policy required hereunder shall contain a provision for a continuing liability thereunder to the full amount thereof, notwithstanding any recovery thereon, that the liability of the insurer shall not be affected by the insolvency or the bankruptcy of the assured, and that until the policy is revoked or expires the insurance company will not be relieved from liability on account of nonpayment of premium, failure to renew license at the end of the year, or any act or omission of the named assured. Such policy of insurance shall be further conditioned for the payment of any judgments up to the limits of

said policy recovered against any person other than the owner, his agent or employee, who may operate the same with the consent or acquiescence of the owner.

(d) Every insurance policy required hereunder shall extend for the period to be covered by the license applied for and the insurer shall be obligated to give not less than thirty (30) days written notice to the Director of Health and to the assured before any cancellation or termination thereof earlier than its expiration date and the cancellation or other termination of any such policy shall automatically revoke and terminate the permits issued for the ambulances covered by such policy, unless another insurance policy complying with the provisions of this section shall be provided and be in effect at the time of such cancellation or termination.

Section 18.196.5 Standards for Ambulance Service Premises.

Ambulance service premises when used for the storage, garaging, and/or maintenance of ambulances shall at all times:

(a) Be maintained in a satisfactory manner as related to cleanliness, neatness and kept in good repair.

(b) Provide lavatory facilities for ambulance personnel adequate to insure proper cleansing may be accomplished by personnel between calls.

(c) Provide for the sanitary storage of ambulance equipment and supplies in sufficient quantity to maintain normal business for a minimal period of one week, without replacement of supplies.

(d) Provide adequate heated storage space for any and all ambulance vehicles during the winter months and appropriate storage at all other times.

(e) Provide adequate space and facilities for the storage of oxygen and other gases in compliance to Fire Code of the City.

(f) Provide adequate space and facilities to permit the proper cleansing of ambulances.

Section 18.196.6. Standards for Ambulances and Ambulance Equipment.

(a) Required equipment for each type of ambulance permitted hereunder shall be listed in Health Department Regulations by the Director of Health, who shall also judge the quality as well as quantity of such equipment.

(b) Ambulance vehicle specifications shall be given in Health Department Regulations by the Director of Health, who shall also assure compliance thereto and maintenance of such vehicles as required herein.

Section 18.197. Duties and Powers of the Director of Health.

Under the provisions of this article, the Director of Health shall have the power to make such reasonable rules and regulations, orders and directions as may be necessary for carrying out the duties of his office, and as are not inconsistent with the provisions of this article and is hereby empowered and ordered to:

(a) Accept applications for all types of permits issued pursuant to this ordinance, and to cause such investigation as he deems necessary to be made of the applicant and/or of his proposed operations.

(b) Issue the appropriate permit(s) hereunder, each to be valid for a period of one (1) year unless earlier suspended, revoked or terminated when he finds:

(1) That the public convenience and necessity require the proposed ambulance service.

(2) That each ambulance, its required equipment and premises designated in the application have been certified as provided for herein.

(3) That the applicant is a responsible and proper person to conduct or work in such a service.

(4) That only duly licensed drivers, attendants, driver-attendants and apprentices are employed in such capacities.

(5) That all the requirements of this act and of the pertinent Health Department Regulations, and all other applicable laws and ordinances have been met.

(6) That all the rules governing the advertisement of emergency ambulance telephone accessing procedures, and the operations of such emergency request receiving facilities have been met.

(c) Examine or cause to be examined, all ambulance personnel applicants, as required by Health Department Regulations.

(d) Reinspect, re-examine, or cause reinspection or re-examination within thirty (30) days prior to renewal of permits, for any and all of the requirements relative to the license to be renewed.

(e) Revoke or cause the revocation of any permit issued pursuant to this ordinance, when there is due cause for such revocation. Permit holders wishing to ap-

peal shall be granted an administrative hearing by the Director of Health of the City within thirty (30) days of request of such proceedings.

(f) The Director of Health is empowered to establish regulations governing the quality of emergency medical care; establish quality audit procedure; and to set emergency medical care protocols.

Section 18.198 Revocation of Permit.

(a) The Director of Health may, and is hereby authorized to, suspend or revoke a permit issued hereunder for failure of a permittee to comply and to maintain compliance with, or for his violation any applicable provisions, standards or requirements of this ordinance or of regulations promulgated hereunder, or of any other applicable laws, ordinances, or regulations. Within sixty (60) days after a suspension the permittee shall be afforded a hearing, after reasonable notice. The Director of Health shall, within ten (10) days after conclusion of such hearing, issue a written decision which shall include written findings as to the suspension of said license. Such written decision shall be promptly transmitted to the permittee to whom it refers.

(b) The initial, or other ambulance, equipment or premises inspection reports of the Director of Health herein provided for shall be prima facie evidence of compliance or noncompliance with, or violation of, the provisions, standards and requirements provided herein, and of the regulations promulgated hereunder, for the regulation of ambulances.

(c) Upon suspension, revocation or termination of an ambulance service or ambulance permit hereunder such

ambulance service or ambulance permittee shall cease operations. Upon suspension, revocation or termination of a driver, attendant, driver-attendant or apprentice permittee hereunder, such driver, attendant, driver-attendant or apprentice shall cease to drive or attend an ambulance and no person shall employ or permit such individual to drive or attend an ambulance.

(d) Revoked permits shall be surrendered immediately to the Director of Health.

Section 18.199.1. Mandatory EMS Data System and Reporting.

As a condition of maintaining a license in good standing, the licensee shall comply with EMS data system and reporting standards as prescribed by the Director. Such standards and reporting requirements shall include, put not be limited to:

(a) Accurate and timely reporting to the EMS Control Center concerning the location and status of all ambulances.

(b) Use of approved code structures and numbering conventions.

(c) Use of approved run report and dispatch report forms on every dispatched run, routine and emergency, transport, or no-haul, one (1) copy of which is to be left with the emergency receiving facility upon delivery of the patient, and another copy of which shall be provided to the Public Trust for data entry and later analysis by the Director. Said run report forms shall be compiled and sorted monthly in accordance with submission requirements of the Director, and shall be delivered to the Public Trust within ten

(10) days after the close of the calendar month for which the runs have been compiled. Alternative plans for more timely data submission may be negotiated with Public Trust at the operator's option.

(d) Operator shall maintain, compile, and submit to the Public Trust such additional reports concerning maintenance, salary schedules, employee utilization—both active and on-call—and such other information as may be requested by the Director in order to better monitor operator performance.

Section 18.199.2 Obedience to Traffic Laws, Ordinances, and Regulations.

(a) The driver of a Type I or Type II ambulance, when responding to an emergency call or while transporting a patient, may exercise the privileges set forth in this section but subject to the conditions herein stated, and only when the licensed attendant has reasonable grounds to believe that an emergency in fact exists requiring the exercise of such privileges.

(b) Subject to the provisions of Subsection (a) hereof, the driver of a Type I or Type II ambulance may:

(1) Park or stand, irrespective of the otherwise applicable provisions of the statutes, ordinances or regulations.

(2) Proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation.

(3) Exceed the maximum speed limits permitted by the statute ordinance or regulation so long as he does not endanger life or property.

(4) Disregard the statutes, ordinances or regulations governing direction or movement or turning in specified directions.

(5) The exemptions herein granted shall apply only when such ambulance is making use of audible and visual signals meeting the requirements of the statutes, ordinances and regulations.

(c) The foregoing provisions of this section shall not relieve the driver of a Type I or Type II ambulance from the duty to drive with regard for safety of all persons, nor shall such provisions protect the driver from the consequences of his disregard for the safety of others.

Section 18.200 Rates and Charges

The Director of Health shall have full and complete power and authority, at any time, to establish and to review the rates charged by a holder of a licensed ambulance service, to fix and revise the rates charged by said holder as he deems necessary after review of all applicable facts and circumstances including that of the public welfare.

Section 18.201 Mandatory Centralized Dispatch and EMS Control.

(a) Every ambulance operated by a licensee under this ordinance shall, at all times, and regardless of run code designation, be dispatched and controlled from a single EMS Control Center, and personnel manning such Control Center shall have full authority to locate and relocate all available ambulance units as necessary to prepare for anticipated changes in frequency and distribution of demand. Such EMS Control Cen-

ter shall be equipped and operated in accordance with Control Center standards, regulations, and dispatch protocols established by the Director. The licensee may conform to these requirements by obtaining access to use of an EMS Control Center through contract with the Public Trust, or with approval of the Director subject to considerations of public health and safety, the licensee may make such other arrangements as may be desirable to the licensee, provided, however, that licensee's EMS Control Center operations shall be conducted in full conformance to applicable standards and regulations, and provided that, regardless of arrangements made by the licensee, the licensee shall be held directly accountable for achieving response time performance as required by Section 18.202 of the ordinance, and any separation of organizational responsibility for EMS Control Center operations which may be agreed to by the licensee may not, for any reason, serve to exempt the licensee from response time performance requirements, or from being penalized for failing to achieve required response time performance under this ordinance.

(b) In the event more than one EMS Control Center is established, licensees operating such Control Centers shall develop and present to the Director such systems, procedures, and equipment configurations as are necessary to insure complete coordination of all resources in the system at any point in time to the extent that each dispatcher in the system has knowledge and authority as necessary to insure that a reasonable number of ambulance units are available to cover anticipated demand during each hour of the day and night, and that these units are located

throughout the City in an optimum distribution pattern given anticipated demand distribution, and that each dispatcher is capable of assigning the nearest available ambulance unit to an emergency call, regardless of ownership of that ambulance unit, and that all dispatchers act collectively to restrict in a reasonable manner the allocation of ambulance units for nonemergency purposes as necessary to maintain a safe level of response readiness at all times.

Section 18.202. Response Time Performance Required.

(a) A licensed operator, as a condition of maintaining its operator's license in good standing, shall employ such personnel, acquire such equipment, and manage its resources as necessary to the provisions of reliable emergency and nonemergency ambulance service throughout its entire primary area of responsibility as defined in its license in accordance with response time standards set forth herein, effective December 1, 1979:

(1) *Code 1 Standards*: The operator shall achieve and maintain an average monthly response time for all calls presumptively designated as Code 1 calls received by the operator from within his primary area of responsibility (except as exempted from this standard as provided for in Paragraph C of this section, below) and such Code 1 average response time shall be not more than five and one-half (5-1/2) minutes or less, with not more than fifteen percent (15%) of all presumptively designated Code 1 calls per month in excess of eight and one-half (8-1/2) minutes.

(2) *Code 2 Standards*: The operator shall achieve and maintain an average monthly response time for all calls presumptively designated as Code 2 calls received by the operator from within his primary area of responsibility (except as exempted from this standard as provided for in Paragraph C of this section, below) and such Code 2 average response time shall be not more than seven (7) minutes or less, with not more than ten percent (10%) of all presumptively designated Code 2 calls per month in excess of twelve (12) minutes.

(3) The operator's response to Code 3 calls shall be reasonable but, in every case where a conflict occurs, response to Code 1 and Code 2 calls shall take precedence over response to Code 3 calls.

(4) The operator shall maintain, for each of the six councilmanic districts of the City of Kansas City, Missouri, monthly response time averages for Code 1 calls of seven (7) minutes or less, and for Code 2 calls an average response time of eight and one-half (8-1/2) minutes or less.

(b) For purposes of this section, the designation of a run as Code 1, Code 2, or Code 3 shall be made by the EMS Control Center personnel at the point of dispatch on a presumptive basis, and no retrospective alteration of such designation shall be allowed except that runs originally designated as Code 2 or Code 3 may be retrospectively redesignated by the Director for purposes of response time calculation as a more time-critical run type if the Director disputes the designation, and if it is the independent judgment of that emergency physician organization retained by

the City to perform medical audits that such original designation was improper, given the information available to the EMS Control Center personnel at the time of the presumptive designation of code type.

(c) For purposes of calculating the operator's response time performance on calls from within his designated primary area of responsibility, the Director shall disregard response times to calls which occur under conditions which, in the opinion of the Director, are unusual and which present response time performance barriers to the operator which are unusual and beyond his control. Conditions which may be deemed by the Director to present unusual circumstances beyond the control of the operator include unusually severe weather conditions, a short-term communications system breakdown beyond the reasonable control of the operator, an unusual concentration of prank calls to the operator tying up large segments of the operator's response capability, participation in rendering disaster assistance to a neighboring community, or the simultaneous occurrence of an unusual and unforeseeable number of calls, given the time of day, day of week, and area served. Furthermore, the Director shall insure that valid techniques of statistical analysis are employed in calculating response time performance, and that in the event an insufficient volume of calls renders it impossible to make any response time performance determination reliable at the ninety-five percent level of confidence, that particular performance standard shall be considered to have been met by the operator, or, at the Director's option, the Director may require the accumulation of additional months of data until sufficient runs have accumulated to allow a determination at the ninety-five percent

level of confidence for a time period in excess of one (1) month.

(d) Chronic poor response time performance by any operator shall be grounds for suspension or revocation of the operator's license by the Director on the recommendation of a two-thirds majority vote of the Physician Advisory Board that the operator's poor performance was not the result of unusual or unpredictable circumstances of weather or disaster situation, and said board has found that the operator's poor performance has unnecessarily threatened public health and safety and that the operator's license should, in the opinion of a two-thirds majority of the Physician Advisory Board, be suspended or revoked.

Section 18.203. Prohibition Against Refusal to Transport on Emergency Calls.

(a) It shall be a violation of this ordinance to fail to respond to a call for transport or render first aid treatment as is necessary or otherwise refuse or fail to provide any emergency services within the scope of the ambulance operations because of the patient's demonstrated or stated inability to pay for such services, because of the location of the patient within the city limits of the City, or because of the status of an operator's ambulance units available at the time of the dispatch.

(b) Because of the normal risk of losses from uncollectibles which may be anticipated by an ambulance service company engaging in emergency work, the Director shall, in his analysis of a licensee's rates and charges as provided for in Section 18.200 allow for reasonable rate adjustments to cover this additional cost of service delivery.

Section 18.204. Quality Control and Medical Audit.

(a) There is hereby created a Physician Advisory Board which shall exercise the powers vested in it and which shall be responsible for the performance of the responsibilities delegated to it by the provisions of this Chapter. The Physician Advisory Board shall consist of five (5) members appointed by the Mayor and who are members of the then-current Board of Directors of the emergency physician organization contracted by the City to conduct its quality control functions. Each member of the Physician Advisory Board shall hold such office until his successor is appointed and qualified. All members shall serve without compensation and shall be licensed physicians regularly engaged in the practice of emergency medicine in the Kansas City area and shall also be Board members of the emergency physician organization retained by the City. No member's term of office on the Physician Advisory Board shall exceed his membership on the Board of Directors of the emergency physician organization discussed above.

(b) The Director shall enter into a professional services contract with a not-for-profit organization of emergency physicians for purposes of conducting certain equipment inspections, personnel assessments, and medical audits of specific cases brought to the attention of the Director by emergency receiving physicians, or by public inquiry. As a result of these fact-finding activities, the Director may recommend to the Physician Advisory Board, or may implement, in appropriate cases, changes in protocols or standards, and/or may recommend further action by the Physician Advisory Board and the City Council regarding suspension, revocation, or refusal to renew an ambulance services license, a vehicle permit, a

personnel certification or permit, or the assessment of a penalty for violation as provided in this ordinance.

Section 18.205. Penalties for Violation.

(a) Any person violating, or failing to comply with the provisions of this ordinance and the applicable provisions hereof, shall be deemed guilty of an ordinance violation and upon conviction thereof shall be fined an amount not less than fifty dollars ($50) not more than five hundred dollars ($500) or imprisoned for a period not exceeding thirty (30) days, or by both such fine and imprisonment, for each offense.

(b) Each day that any violation of or failure to comply with this act is committed or permitted to continue shall constitute a separate and distinct offense under this section and shall be punishable as such hereunder; provided, however, that the Court may, in appropriate cases, stay the cumulation of penalties.

Section 18.206. Special Provisions.

(a) *Appeal.* Any applicant and/or protestant shall have the right to appeal any action taken by the Director, the emergency physician organization retained by the City, Public Trust, or the Physician Advisory Board, relating to the issuance, denial, revocation, alteration, or suspension of the operator license, personnel certification, or vehicle permit to the Council by filing with the Public Trust within ten (10) days from the date of said order a written notice of appeal; said notice shall set forth the grounds for the appeal. The City Council may, after a hearing, sustain, reverse, or modify the action being appealed.

(b) *Patient Management in Medical Emergency and Management of the Scene of a Medical Emergency.* Au-

thority for patient management in a medical emergency shall be vested in that licensed physician or EMT attendant at the scene of the emergency who has the most training specific to the provision of emergency medical care. If a licensed physician or EMT is not available, the authority shall be vested in the most appropriately trained representative of other public safety agencies who may have responded to the emergency. Authority for the management of the scene of a medical emergency shall be vested in appropriate public safety agencies. The scene of a medical emergency shall be managed in a manner designed to minimize the risk of death or health impairment to the patient and to other persons who may be exposed to the risks as a result of the emergency condition, and priority shall be placed upon the interests of those persons exposed to the more serious remediable risks to life and health. Public safety officials shall ordinarily consult emergency medical services personnel or other authoritative medical professionals at the scene in the determination of relevant risks.

(c) *Emergency Operation of Vehicle.* It shall be unlawful to operate an ambulance as though emergency conditions exist, when the driver knows or should have reason to know such conditions do not exist.

(d) *Unlawful Practice.* It shall be unlawful for any operator, driver, or EMT attendant to administer, prescribe, employ, or sell any drug, herb, medicine, or treatment device or attempt the treatment of disease, except as provided herein.

(e) *Prohibition Against Willful Downgrading of Code Status.* Willful downgrading of presumptive run code designations by the operator shall constitute grounds

for suspension or revocation or refusal to renew an operator license. Any instance in which it is discovered that operator's management or supervisory personnel have encouraged a dispatcher to downgrade any presumptive code designation shall constitute "willful downgrading" on the part of the operator. Any alterations of the original entry of the presumptive code designation by anyone in operator's employ shall also constitute "willful downgrading" on the part of the operator. In addition, should the Physician Advisory Board find that there is a chronic and persistent pattern of error in presumptive code assign- by operator's dispatchers, and such pattern is persistently in the direction of downgrading, as opposed to upgrading errors, and such pattern continues in the opinion of the Physician Advisory Board for three months or more, then the existence of such pattern, as determined by the Physician Advisory Board shall constitute prima facie evidence of willful downgrading on the part of the operator. Cooperation on the part of a dispatcher in such willful downgrading activities shall also constitute grounds for revocation of that dispatcher's certification as a dispatcher, attendant, and/or driver.

(f) *Professional Conduct.* Drivers and attendants operating under this Chapter shall at all times conduct themselves in a professional manner, as generally described in rules of professional conduct which shall be written and compiled by the Physician Advisory Board and which shall be made available to all holders of professional certifications at the time such certification is issued.

(g) *Effective Dates.* All sections of this Chapter shall be in full force and effect immediately, except those which specifically state otherwise.

(h) *Grandfather Clause.* It is hereby declared that all ambulance licenses, vehicle permits, and personnel registrations and certifications which were issued by the City prior to November 1, 1979, and which were valid, *and* in effect on October 31, 1979, *and* whose holders named on such permits and licenses were actively engaged in the provision of ambulance services in the City on October 31, 1979, or, in the case of personnel, were employed by an ambulance company meeting the condition defined immediately above on that same date, shall be automatically reinstated under this ordinance for the same period of time for which such permit or license was originally issued, but not to exceed the original expiration date of that license or permit. It is further declared that any ambulance license or permit held by an individual or firm which was not actively engaged in ambulance service delivery in the City on October 31, 1979 shall not be automatically reinstated under this ordinance and such permit shall automatically expire upon the effective date of this ordinance.

Section B. If any section, subsection, sentence, clause, phrase, or portion of this ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision and such holding shall not affect the validity of the remaining portions hereof.

Section C. This ordinance is declared to be an emergency measure within the provisions of Section 15, Article II, of the Charter of Kansas City, Missouri, and shall take effect upon passage.

Approved as to form and legality:

.....

Assistant City Attorney

A144

53539

Amended

AN ORDINANCE

THIS ORDINANCE
EFFECTIVE IMMEDIATELY

Form 3827 - Law

AMENDING CHAPTER 18 OF THE CODE OF GENERAL ORDINANCES BY REPEALING ARTICLE X ENTITLED "AMBULANCE SERVICE" AND ENACTING IN LIEU THEREOF A NEW ARTICLE X ENTITLED "AMBULANCE SERVICE" IMPLEMENTING THE PUBLIC UTILITY MODEL FOR THE PROVISION OF AMBULANCE SERVICES THROUGH THE METROPOLITAN AMBULANCE SERVICES TRUST, AUTHORIZING AMENDMENT OF THE TRUST INDENTURE, AND DECLARING AN EMERGENCY.

WHEREAS, the Metropolitan Ambulance Services Trust was established to assist the City in providing quality emergency medical services to all inhabitants and was approved by Ordinance 50800; and

WHEREAS, the Council has studied over the last several years ambulance service systems from throughout the nation; and

WHEREAS, it has been determined by the Council that the public utility model for the provision of ambulance services is the method by which the highest quality care can be rendered to all inhabitants of an area; and

WHEREAS, a variety of methods have been employed in the City including government operated ambulances,

multiple private companies, two-tiered basic and advanced response, central dispatching of multiple ambulance services, dedicated ambulances answering only emergency calls, and variations of these methods, but each type of service has proven to be less efficient that the Public Utility Model; and

WHEREAS, each step taken toward full implementation of the Public Utility Model has resulted in improved performance and cost containment; and

WHEREAS, the Metropolitan Ambulance Services Trust purchased the only ambulance service company lawfully providing service in the City; and

WHEREAS, the Metropolitan Ambulance Services Trust is now operating the ambulance service through its recently purchased company until the competitive bid process can produce an operations contractor; and

WHEREAS, new ambulances, on-board equipment, communications equipment, and data processing equipment have been purchased; and

WHEREAS, the Metropolitan Ambulance Services Trust is prepared to put the operations contract to the competitive bid process; and

WHEREAS, the Emergency Physicians Foundation has demonstrated dedicated service to the goal of attaining the highest quality emergency medical services; and

WHEREAS, the implementation of the Public Utility Model depends upon technical scientific and medical decisions which are appropriately made by the Director of Health through regulations promulgated to fulfill the policy and intent of this ordinance; NOW THEREFORE,

BE IT ORDAINED BY THE COUNCIL OF KANSAS CITY:

Section 1. That Article X of Chapter 18 of the Code of General Ordinances entitled "Ambulance Service" is repealed, and enacted in lieu thereof is a new Article X entitled "Ambulance Service" to read as follows:

Article X

AMBULANCE SERVICE

Section 18.195. *Purpose.*

It is the purpose of this Article to complete the implementation of the Public Utility Model for the provision of ambulance services through the designation of specific responsibilities to the major components of the model, the Director of Health, the Metropolitan Ambulance Services Trust (MAST), and the Emergency Physicians Advisory Board (EPAB).

Section 18.196 *Definitions.*

Ambulance. Any motor vehicle equipped with facilities to convey infirm or injured persons in a reclining position.

Base Station Physician. A physician licensed to practice medicine in the State of Missouri, knowledgeable in the medical protocols, radio procedure, and general operating policies of the Kansas City, Missouri emergency medical services system, and a person from whom ambulance attendants may take medical direction.

Emergency Medical Technician EMT. An ambulance driver or attendant licensed by the State of Missouri as an Emergency Medical Technician, and certified by the Director of Health.

Emergency Physician Advisory Board (EPAB). The board empowered to recommend various standards, rules, and regulations for the operation of the ambulance system, and to perform medical audits.

Emergency Physicians Foundation (CPF). A professional and charitable organization composed of and controlled by full-time emergency physicians presently serving in an advisory capacity to the Director of Health, and performing medical audits.

EMS Control Center. Single facility designated by MAST as the central communications center from which all ambulances operating in the City subject to regulations pursuant to this Ordinance, shall be dispatched and controlled at all times.

First Responder. Any person, fire department vehicle, police vehicle, volunteer unit, or non-transporting ambulance unit capable of providing appropriate emergency care, as evidenced by current certification in cardiopulmonary resuscitation, and such other evidence of training as may be required for first-responder designation by the Director of Health.

Helicopter Rescue Unit. Any rotary wing aircraft providing basic or advanced emergency medical service and transportation.

Life Threatening Emergency. A situation posing immediate threat to human life or of long-term disability, including but not limited to, acute respiratory distress, shock, airway blockage, bleeding beyond control, acute poisoning, acute cardiovascular distress, or central nervous system injury.

Medical Audit. An official inquiry into the circumstances involving an ambulance run or request for service,

conducted by a base station physician designated to conduct such an audit by the Medical Director.

Medical Control. Direction given ambulance personnel by a base station physician through direct voice contact, with or without vital sign telemetry, as required by applicable medical protocols approved by the Director of Health.

Medical Protocol. Any diagnosis-specific or problem-oriented written statement of standard procedure, or algorithm, approved by the Director of Health as the normal standard of prehospital care for a given clinical condition.

Metropolitan Ambulance Services Trust (MAST). The entity established to oversee and manage the operation of the ambulance service system.

Mobile Emergency Nurse. A registered nurse licensed by the State of Missouri, knowledgable of advanced life support ambulance care and certified by the Director of Health as a Mobile Emergency Nurse.

Mutual Aid Call. Request for emergency ambulance service issued by an ambulance dispatcher in one political jurisdiction to an ambulance dispatcher or ambulance crew normally operating in a neighboring political jurisdiction.

Paramedic. A person licensed by the State of Missouri as a Paramedic and certified by the Director of Health as knowledgable of and competent to perform advanced life support procedures and the medical protocols established by the Director of Health.

Patient. Any person who is ill, injured, or otherwise incapacitated, bedridden, or helpless and who required and/or requests ambulance services.

Public Utility Model. That strategy for the organization, financing, management, and regulation of ambulance service operation which employs the use of a single level of advanced life support capability for the conduct of all emergency and non-emergency service within a geographical area. Mechanisms of payment which neutralize the "fee-for-service incentive" to overserve or underserve any given patient or geographic area, optimum economies of scale to spread fixed costs of sophisticated ambulance service operations over a wider range of production, competitive procurement of "facilities management" services from a qualified private firm, financing strategies which minimize or allow minimization of local tax subsidy, ownership or direct control of all systems hardware by the public sector, and other features intended to promote clinical excellence reliable response time performance, disaster readiness, long-range stability of service, and cost containment.

Response Time. The actual elapsed time between receipt of notification at the EMS control center that an ambulance is needed at a location and the arrival of that ambulance at the location.

Senior Paramedic in Charge. That individual among the certified personnel assigned to an ambulance, not the Driver, who is a certified Paramedic designated as the individual in command of the ambulance, its operation, and any other persons assigned to the ambulance on a given shift.

Special Use Permit. A permit issued by the Director of Health to hospitals, and other institutions serving the public, for the provision of specialized mobile intensive care services and emergency care.

Section 18.197. *Permits and Certificates Required.*

(A) *Personnel.*

No person shall be employed as an ambulance driver, attendant or dispatcher of ambulances regulated by this Article, unless he holds a certification issued by the Director of Health, and has passed an approved physical examination.

(B) *Ambulance.*

No ambulance regulated by this Article shall be used to provide any ambulance service unless it has been issued a permit by the Director of Health.

(C) *Helicopter Rescue Unit.*

No helicopter rescue unit regulated by this Article shall be used to provide any emergency medical service unless it has been issued a permit by the Director of Health.

Section 18.198. *Application for Permits.*

(A) *Personnel.*

(1) *Submission.*

Applications for certification as an ambulance driver, attendant or dispatcher shall be made on forms supplied by the Director of Health and accompanied by a nonrefundable $15.00 application charge. Nothing in this Article shall be construed as requiring the City to be responsible for the cost of physical examination.

(2) *Permit limitations.*

The Director of Health shall issue probationary certificates, except those presently holding a valid

certification shall not be required to obtain a probationary certification prior to issuing full certifications.

(3) *Criteria.*

(a) The Director of Health shall promulgate regulations setting forth the requirements to obtain a certificate as an ambulance driver, attendant (EMT or Paramedic), or dispatcher. The requirements shall include certification by the State of Missouri and an examination testing the applicant's knowledge of local medical protocol, special disaster procedures, the Kansas City ambulance system in general, and other matters appropriate to determining the applicant's fitness. A practical skills examination may also be required.

(b) Effective March 1, 1983, all ambulance drivers must maintain certification under the National EMT and Paramedic Registry Program as an EMT or Paramedic.

(c) Effective March 1, 1983, all ambulance attendants must maintain certification under the National EMT and Paramedic Registry Program as a Paramedic.

(B) *Ambulance and Helicopter Rescue Unit.*

(1) *Submission.*

Applications for permits shall be made on forms supplied by the Director of Health.

(2) *Criteria.*

(a) The Director of Health shall promulgate regulations setting forth the requirements to obtain a permit for any ambulance or helicopter rescue unit

regulated by this Article including special use permits. Helicopter rescue units shall not be subject to regulation of on-board equipment or personnel. Helicopter rescue units shall agree to submit to control by the EMS control center in Kansas City and not already dispatched to non-Kansas City call. They shall be subject to medical audits.

(b) Only ambulances meeting at least minimum state requirements and capable of full advanced life support service may receive a permit. Unless the vehicle is owned or leased by MAST, or by an exempt person as described in §18.206, no permits may be issued.

(C) *Revocation of Permits and Certification.*

The Director of Health is authorized to revoke or suspend any permit or certification issued pursuant to the provisions of this Article if the driver, attendant, dispatcher, ambulance or helicopter rescue unit fails to maintain the basic qualifications for issuance or otherwise constitutes a danger to the safety and health of patients.

(1) Prior to revocation or suspension of a certificate a medical audit shall be conducted by the Medical Director or his designee.

(2) If the audit results in a recommendation that the driver, attendant or dispatcher certificate should be revoked or suspended, the report shall be forwarded to the entire EPAB.

(3) The EPAB shall notify the affected person of the audit results and invite him to provide any information, in writing or personally, for the Board's consideration.

(4) If the EPAB recommends revocation or suspension, the report shall be forwarded to the Director of Health.

(5) The Director of Health shall provide a hearing to any person certified pursuant to this Article or ambulance or helicopter rescue unit owner or operator at which time reasons for revocation or suspension shall be explained. The affected party may present information relevant to the issue of permit revocation or suspension.

(6) If the Director of Health determines that the risk of harm to the public is substantial, the certification may be suspended without first providing a hearing. But a hearing shall be scheduled to convene within seven days of the suspension to consider revocation of the certification.

(7) In lieu of suspension or revocation, the Director of Health may return the non-probationary certificate holder to probationary status, or reduce the level of certification.

(D) *Term.*

(1) All permits and certifications issued pursuant to this Article shall be valid for a period of one year from date of issuance.

(2) It shall be the responsibility of a permit or certificate holder to apply for a new permit or certificate no later than 30 days prior to expiration of the current permit or certificate.

(E) *Appeals.*

Adverse decisions of the Director of Health may be appealed pursuant to the provisions of the Missouri Ad-

ministrative Procedure and Review Act, Chapter 536, Revised Statutes of Missouri to the Circuit Court.

Section 18.199. *Duties of the Director of Health.*

(A) *Authority to Promulgate Regulations, Standards and Rules.*

(1) The Director of Health shall have the authority to promulgate regulations, standards and rules necessary to implement the policy and intent of this Article. They shall constitute one volume to be filed in the Office of the City Clerk.

(2) The Director of Health shall consider, but not be limited to, the following factors when promulgating regulations, standards, and rules.

(a) The protection of the safety and health of the inhabitants of Kansas City;

(b) Accepted standards of practice for emergency medical care;

(c) Accepted requirements for equipment and supplies to provide advanced life support services;

(d) Federal and state requirements; and

(e) Standards and recommendations of federal, state and local professional organizations interested in the provision of quality emergency medical care.

(3) *Emergency Physicians Advisory Board.*

When promulgating regulation, standards and rules, the Director of Health shall provide to the Emergency Physicians Advisory Board proposed changes for its recommendations and comments.

(4) *Standards to be Promulgated.*

The Director of Health shall promulgate standards controlling the following segments of the ambulance service system:

(a) Production standards related directly or indirectly to clinical performance and patient care; including response time consistent with the provisions of §18.202;

(b) Diagnosis-specific and problem-oriented medical protocols to serve as the required standard of prehospital emergency care;

(c) Procedures governing the reliable provision of 24-hour medical control;

(d) Procedures and protocols for the operation of the EMS Control Center, which may include but not be limited to, radio protocols, telephone protocols, and other operating standards; and

(e) Procedures for the provision of medical control over the delivery of advanced life support procedures by ambulance personnel, which may include but not be limited to, medical control communications standards, radio equipment standards, radio protocol, medical protocol, qualifications of base station physicians or emergency department nurses from whom ambulance personnel may take direction.

(B) *Delegation.*

The Director of Health may delegate functions, but he shall remain responsible for compliance with this Article.

(C) *Disaster Planning, and Protocol Development.*

(1) The Director of Health shall develop a plan for the rescue and medical care of persons in disaster situations.

(2) After a proclamation by the Mayor has established the existence of a disaster situation whether resulting from tornado, fire, wind, flood, enemy action, or any other common disaster or catastrophe, the EMS Control Center shall be authorized to control all ambulances, helicopter rescue units, mutual aid responders, and special use vehicles.

(D) *Approvals.*

(1) *Communications Systems.*

The Director of Health shall approve the dispatch communications system and the medical control communications system established by MAST. In reviewing the medical control communications system the EPAB shall be consulted. Nothing herein shall prevent the Director of Health from promulgating regulations or standards controlling communications systems.

(2) *Rates.*

The Director of Health shall have the authority to forbid MAST to bill at a rate deemed too high after considering the public safety health and welfare and the economic needs of MAST to provide quality ambulance service.

(E) *Permits and Certificates.*

The Director of Health shall issue permits and certificates consistent with the provisions of §18.197 and §18.198 of this Article.

(F) *Annual Report.*

The Director of Health shall report annually to the Mayor and Council the status of the ambulance service system including but not limited to, the financial condition of MAST, the subsidy supplied by the City, audits of cases, recommendation for improvement, and regulations promulgated during the year. This report shall incorporate the reports of the EPAB and MAST made to the Director of Health.

(G) *Emergency Physicians Advisory Board.*

(1) *Establishment.*

(a) The Director of Health shall establish an Emergency Physicians Advisory Board, also known as EPAB, consisting of nine licensed physicians engaged in the full-time practice of emergency medicine to serve without compensation.

(b) The first EPAB shall consist of the present members of the Emergency Physicians Foundation Board of Directors. Those nine shall report to the Director of Health after the first meeting following passage of this ordinance the names of three persons selected by the EPF to serve three year terms, three persons to serve two year terms and, three persons to serve one year terms.

(2) *Filling New or Unexpired Terms.*

(a) In the event of a vacancy, the Director of Health shall appoint a physician engaged in the full-time practice of emergency medicine to the EPAB. The EPF shall recommend to the Director of Health physicians engaged in the full-time practice of emergency medicine to complete

a term or serve a full term as a member of the EPAB.

(b) All terms following the initial terms described in §18.199(G)(1)(b) shall be for three years.

(3) *Chairman.*

The EPAB shall select such officers as necessary to meet its obligations under this article.

Section 18.200. *Duties of the Metropolitan Ambulance Services Trust.*

(A) *Generally.*

It shall be the duty of MAST to oversee and manage the ambulance service system to provide quality ambulance service to all inhabitants of Kansas City.

(B) *Labor and Management Services.*

(1) MAST shall contract for the supply of all labor and management services for the operation of its EMS Control Center and its direct ambulance operations.

(2) *Competitive Bidding Required.*

(a) To determine the best qualified company for the Kansas City ambulance service system MAST shall procure the contractor through competitive bidding not less than every three years.

(b) MAST shall seek bids from the national market. It shall place advertisements in national trade publications as well as meet City public notice requirements with respect to its procurement policies.

(c) MAST may require performance bonds or acceptable alternatives to protect its interest and that of the public.

(d) MAST shall consider, but not be limited to, considerations of the protection of the public safety and health by the provision of high quality pre-hospital emergency care and ambulance service, and of cost containment.

(C) *Ownership of Equipment.*

MAST shall own, or be the primary lessee of all emergency equipment used in supplying ambulance services.

(D) *Rates, Billing and Collections.*

(1) Generally MAST shall determine reasonable rates, subject to disapproval by the Director of Health, and shall perform all billing and collection functions.

(2) *Exception.*

MAST may permit the operations contractor to collect accounts representing long distance inter-city transfer work.

(E) *In-Service Training.*

(1) MAST shall assure that appropriate in-service training is provided to employees of the operations contractor. MAST may require the operations contractor to provide the in-service training program.

(2) MAST shall require that all employees of the operations contractor attend in-service training programs.

(a) In-service training programs shall be attended not less than once every month; each session shall be not less than two hours in duration.

(b) In-service training shall include system orientation and management issues, medical audit findings and review, and clinical skill development.

(c) In-service training shall be scheduled to permit all employees to fulfill their mandatory obligations to attend.

(d) MAST shall include in its annual report to the Director of Health the extent of the in-service training accomplished. MAST shall maintain accurate records of attendance at in-service training which shall be provided to the Director of Health and the Medical Director for use in considering certificate suspension or revocation and permit renewal.

(e) If an employee fails to attend in-service training during any two month period the Medical Director shall inquire of the reasons and may recommend to the Director of Health that the requirement be waived. In any event, a report of the failure to attend shall be made to the Director of Health by MAST.

(F) *Records and Premises Open to Inspection.*

MAST shall maintain its records and premises open to inspection by the Director of Health.

(G) *Recommendations to the Director of Health.*

MAST shall provide recommendations to the Director of Health for the following elements of the ambulance service system:

(1) Dispatch communication system;

(2) Medical control communication system;

(3) Any other matter requested by the Director of Health relative to the operation and status of the ambulance service system.

(H) *Annual Report.*

MAST shall report in writing to the Director of Health at least once a year at a time set by the Director of Health detailing the status of the ambulance service system including, but not limited to, its financial status, billing and collection, services rendered to the EPAB, complaints concerning any element of the system and steps taken to investigate, conclusions and actions taken, response times by council districts and type of call, in-service training of all ambulance personnel, and recommendation for improvement of the system.

(I) *MAST as Operations Contractor.*

In the event of an emergency in which the public health and safety are threatened by the inadequate performance of an existing operations contractor, or by the absence of qualified bids at reasonable costs for the performance of the required services, MAST may act as operations contractor for the duration of the emergency but in no event longer than one year.

(J) *Mutual Aid and Shared Services.*

MAST may contract for services from neighboring providers. Such contractors shall be subject to medical audit by the EPAB. Consideration for such services may be financial or in kind. Nothing in this Article shall be construed as prohibiting MAST from receiving or rendering emergency mutual aid without formal agreement.

Section 18.201 *Duties of the Emergency Physicians Advisory Board.*

(A) *Generally.*

The Emergency Physicians Advisory Board (EPAB) is an advisory board of seven licensed physicians engaged in the full-time practice of emergency medicine appointed by the Director of Health serving without compensation, which recommends to the Director of Health actions promoting the goal of high quality pre-hospital emergency care and ambulance service.

(B) *Recommendations.*

The EPAB shall provide to the Director of Health recommendations concerning the following elements of the ambulance service system:

(1) Criteria for the issuance, renewal, suspension and revocation of permits and certifications;

(2) Production standards related directly or indirectly to clinical performance and patient care;

(3) Diagnosis-specific and problem oriented medical protocols to serve as the required standard of pre-hospital emergency care;

(4) Procedures governing the relative provision of 24-hour medical control;

(5) Procedures and protocols for the operation of the EMS Control Center;

(6) Procedures for the provision of medical control over the delivery of advanced life support procedures by ambulance personnel;

(7) Standards for the medical control communications system;

(8) Elements of disaster plan designed to provide prompt quality care and rescue of persons in disaster situations.

(C) *Medical Audits.*

(1) The EPAB shall perform medical audits when requested by the Medical Director or a designated base station physician, by any physician on his own patient, by any doctor involved in the case, chairman of MAST, Director of Health, or when in the Board's discretion it is determined that a specific incident merits investigation or an element of the ambulance service system may be improved and study is warranted.

(2) Audits shall be performed on a diagnosis specific basis to determine if there exists areas for improvement of treatment.

(D) *Medical Director.*

(1) The Medical Director shall be appointed by the EPAB, and serve at its pleasure. The Director of Health must approve the appointment of the Medical Director. The Medical Director may be a member of the EPAB.

(2) The Medical Director and expenses approved by the Director of Health shall be compensated by the Department of Health.

(3) The Medical Director may delegate duties to qualified base station physicians or others whose expertise is necessary for complete and thorough medical audits;

(4) The Medical Director may appoint an Assistant to the Medical Director who shall be at least

a certified paramedic, or have equivalent training and experience.

(E) *Annual Report.*

The EPAB shall report in writing to the Director of Health at least once a year at a time set by the Director of Health detailing the status of the ambulance service system including, but not limited to, a review of medical audits, audit procedures followed, and recommendations for improvement of the system. A copy of this report shall be provided to MAST.

Section 18.202. *Response Time.*

(A) An advanced life support ambulance shall be on the scene of each life threatening emergency call as determined by the dispatcher at the time of the call in accordance with regulations, within eight minutes on 90% of all calls. For all presumptively designated life threatening emergencies through notification of the Fire or Police Department, best efforts will be made to place a first responder unit on the scene within four minutes.

(B) For all presumptively life threatening emergency calls exceeding eight minutes MAST shall provide a general summary and the action it has taken to reduce the number of responses beyond eight minutes in its annual report to the Director of Health.

(C) To provide prompt initial care a first-responder program shall be developed by the Director of Health with the assistance of the EPAB, MAST and other agencies and parties providing emergency care with a goal of on scene response within four minutes.

(D) The ambulance service system shall be operated to reduce to the lowest figure reasonably attainable any discrepancies in response times throughout the City.

(E) MAST shall contractually establish response times for all non-life threatening emergency calls, but they shall not be more stringent than that required for life-threatening emergency calls.

Section 18.203. *Obedience to Traffic Laws.*

(A) When the senior Paramedic in charge of an ambulance has reasonable grounds to believe that an emergency exists, the driver of the ambulance may:

(1) Park or stand, irrespective of the otherwise applicable rule of law established by ordinance;

(2) Proceed past a red or stop signal or stop sign, but only after slowing as may be necessary for safe operation;

(3) Exceed the maximum speed limits permitted by the City so long as life or property is not endangered; or

(4) Disregard ordinances or regulations of the City governing the direction of movement or turning in specified directions.

(B) The exemptions listed in subsection (A)(2)-(4) shall apply only when such ambulance is making use of audible and visual signals meeting the requirements of the regulations promulgated by the Director of Health; the exemption listed in subsection (A)(1) shall apply only when such ambulance's making use of visual signals meeting those requirements.

(C) The exemptions listed in subsection (A) do not relieve the driver from the duty to drive with regard for the safety of all persons.

Section 18.204. *Patient and Scene Management.*

(A) The Senior Paramedic in charge shall have the authority for patient management at the scene of an emergency.

(B) Authority for management of the emergency scene, exclusive of medical control over patients, shall rest with public safety officials.

(C) In the event a licensed physician appears on the scene and desires to assume direction and control of patient care, he shall execute a form which declares he has assumed responsibility for patient care.

Section 18.205. *Destination Determination.*

(A) For all life threatening emergency calls the patient shall be taken to the nearest appropriate facility for that clinical condition in accordance with approved medical protocols, unless otherwise directed by a base station physician.

(B) For all non-life threatening emergency calls the patient shall be taken to the destination of the patient's choice, or in cases where the patient is incompetent or unable to make such a judgment the patient shall be delivered to the destination requested by the appropriate party acting on behalf of the patient. If no person is available to act for the patient, he shall be delivered to the nearest available emergency receiving facility.

Section 18.206. *Exceptions.*

(A) The provisions of this Article shall not apply to helicopter rescue units, ambulances, and their personnel which are:

(1) Owned and operated by an agency of the United States Government;

(2) Rendering assistance at the request of the EMS Control Center in cases of disaster or major emergency too great for MAST resources, or in response to the provisions of a written mutual aid agreement;

(3) Engaged in the process of an inter-city transfer originating outside Kansas City;

(4) Private businesses using an ambulance solely for the transportation of their employees for injury or illness sustained while performing their work;

(5) Privately owned and designed for the transportation of the infirm or physically handicapped, and used solely for the benefit of its owner and family, and is not for hire;

(6) Owned and operated by a hospital, and used exclusively for specialized mobile intensive care or for inter-institutional transfers of admitted patients of the owner hospital, provided the ambulance or helicopter rescue unit has a valid special use permit issued pursuant to §18.198.

(B) An owner or operator of an ambulance not exempted by the provisions of subsection (A) may request exemption for the Director of Health. The Director of Health shall determine whether or not the ambulance is to be used for the sole benefit of the owner or his family in permitting use of the privately owned vehicle. Appeals of this decision may be taken as provided in §18.198(E).

Section 18.207. *Violations and Penalties.*

(A) *Violations.*

It shall be unlawful:

(1) To perform duties as an ambulance driver, attendant (EMT or Paramedic), or dispatcher without a current permit issued by the Director of Health;

(2) To permit a person to work as an ambulance driver, attendant or dispatcher without a current permit issued by the Director of Health;

(3) To use or cause to be used any ambulance service other than that established by this Article unless exempted by the provisions of §18.204.

(4) To provide ambulance services, emergency or transfer, within the City unless authorized by this Article or exempted by the provisions of §18.204.

(5) To knowingly give false information to induce the dispatch of an ambulance or helicopter rescue unit.

(B) *Penalties.*

(1) Any person convicted of violating the provisions of this Article shall be fined no more than Five Hundred Dollars ($500.00) or imprisoned for a period not to exceed six months, or by both such fine and imprisonment. This does not serve to limit any other remedies available to the City in law or equity.

(2) Each day that any violation of this Article is committed or permitted to continue shall constitute a separate offense.

Section 2. That the Trustor, Director of Finance of the City of Kansas City, is hereby authorized in accordance with Article VIII of the Trust Indenture-Metropolitan Ambulance Service Trust, to modify the Indenture to read as follows:

ARTICLE I

Creation of Trust

The undersigned Trustor creates and establishes a Trust for charitable, benevolent, health, civic, and other public purposes hereinafter set forth, for the use and benefit of the City of Kansas City, Missouri, a municipal corporation, insofar as such provisions as are set forth herein are not in conflict with, nor are prohibited by, any other state or local statute controlling the creation and operation of public trusts.

ARTICLE III

Purposes of Trust

The purposes of this Trust are:

1. To promote charitable, benevolent, health, civic purposes and other public purposes by assisting the City of Kansas City, Missouri, to own, construct, finance, furnish, equip, maintain and operate, or cause to be operated, an emergency medical services system for the inhabitants of the City of Kansas City, Missouri.

Section 3. That this ordinance making provisions for the immediate preservation of the public health and safety, is declared to be an emergency measure within the mean-

ing of Section 15, Article II, of the Charter, and shall take effect immediately upon passage.

Approved as to form and legality:

/s/ William D. Geary
Assistant City Attorney

Authenticated as Passed

/s/ Richard L. Berkley,
Richard L. Berkley, Mayor

/s/ E. Richard Brenneman
City Clerk

/s/ Mary M. Hayes
Deputy City Clerk

December 17 1981

APPENDIX C

SECTION 67.300 (1978) REVISED STATUTES OF MISSOURI

1. Any county, city, town or village may provide a general ambulance service for the purpose of transporting sick or injured persons to a hospital, clinic, sanatorium or other place for treatment of the illness or injury, and for that purpose may

(1) Acquire by gift or purchase one or more motor vehicles suitable for such purpose and may supply and equip the same with such materials and facilities as are necessary for emergency treatment, and may operate, maintain, repair and replace such vehicles, supplies and equipment;

(2) Contract with one or more individuals, municipalities, counties, associations or other organizations for the operation, maintenance and repair of such vehicles and for the furnishing of emergency treatment;

(3) Employ any combination of the methods authorized in subdivisions (1) and (2) of this section.

2. The municipality or county shall formulate rules and regulations for the use of the equipment and may fix a schedule of fees or charges to be paid by persons requesting the use of the facilities and provide for the collection thereof.

3. The municipality or county may purchase insurance indemnifying against liability of the county or city and the driver and attendants of the ambulance for the negligent operation of the ambulance or other equipment or supplies or in rendering services incidental to the furnishing of the ambulance service.

Supreme Court, U.S.
FILED
SEP 21 1983
ALEXANDER L. STEVAS
CLERK

No. 83-138

In the Supreme Court of the United States

October Term, 1983

GOLD CROSS AMBULANCE CO., INC., et al.,
Petitioners,

vs.

CITY OF KANSAS CITY, MISSOURI, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GEORGE E. LEONARD
Counsel of Record
RUSSELL S. JONES, JR.
SHUGHART, THOMSON & KILROY, P.C.
922 Walnut Street
P. O. Box 13007
Kansas City, Missouri 64199
(816) 421-3355
Counsel for Respondents Metropolitan Ambulance Services Trust, Ambulance Service, Inc., Jack Stout and Fourth Party, Inc.

WILLIAM D. GEARY
Law Department of City of Kansas City, Missouri
414 East 12th Street
Kansas City, Missouri 64106
(816) 274-2381
Counsel of Record for Respondent City of Kansas City, Missouri

E. L. MENDE

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Metropolitan Ambulance Services Trust (MAST), City of Kansas City, Missouri, Ambulance Services, Inc., Fourth Party, Inc., and Jack Stout[1] respectfully submit this Brief in Opposition to the Petition for a Writ of Certiorari filed by petitioners Gold Cross Ambulance Co., Inc. and Transfer and Standby Services, Inc. Petitioners seek review of the decision of the United States Court of Appeals for the Eighth Circuit that respondents' actions in creating a single-provider ambulance system for the City of Kansas City, Missouri, are exempt from antitrust scrutiny by virtue of the "state action" doctrine of *Parker v. Brown*, 317 U.S. 341 (1943) and its progeny.

1. None of the respondents have any parents, subsidiaries or affiliates. MAST purchased the stock of Ambulance Services, Inc. in 1981, and ASI ceased to be an active corporation in July 1982. Although petitioners have identified as respondents Hadley Reimal, Eugene Desaulniers, June Desaulniers and Lawrence Hughes, these persons are not properly before this Court, as their motion for summary judgment was denied by the District Court, and this denial was not appealed to the Eighth Circuit.

OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals, reported at 705 F.2d 1005 (1983), appears in Appendix A to petitioners' Petition, at page A1. The opinion of the United States District Court for the Western District of Missouri, reported at 538 F. Supp. 956 (1982), is set forth at page A27 of the Petition.

STATEMENT OF THE CASE

This case arises out of the efforts by the City of Kansas City to provide high quality, economically efficient, advanced prehospital emergency medical care for the people of Kansas City. Respondent MAST is a not-for-profit public trust created by the City and charged with overseeing the City's ambulance system. Respondents Stout and Fourth Party are consultants who played a part in Kansas City's decision to deliver ambulance service to its residents through what is known in the industry as the "public utility model" of ambulance service.

The public utility model, as applied to Kansas City, provides, *inter alia,* for the designation of a single provider of all ambulance services. The provider responds to each ambulance call, whether emergency or non-emergency, with a fully equipped ambulance. A single provider is necessary for two reasons: (1) to prevent medical crises in which a supposedly routine, non-emergency transfer turns suddenly into a life-threatening event requiring sophisticated, advanced life support (ALS) capabilities lacking in many ambulances; and (2) to allow the public to offset the high cost of providing city-wide emergency service (which has extremely high fixed costs and a

meager fee collection rate) with revenues from lower-cost and much more profitable non-emergency transfer service. If there were more than one provider, non-emergency revenues would flow not to the public, but to the provider who ran predominantly non-emergency calls.

Under the model, a public entity which has political as well as medical accountability oversees the city's ambulance service; day to day *operation* of the service is delegated to a private ambulance company, called the operations contractor. The operations contractor, selected by an open competitive bid process, is paid a flat fee for its services, and penalized for slow response times or poor medical care. The public entity handles billings and collections.[2]

The City of Kansas City adopted and implemented major components of the public utility model in 1979, in response to major problems with the ambulance system in place at that time. The record shows that the City had provided emergency ambulance service, through the Kansas City General Hospital and, later, the Fire Department, for many years. In the early 1970's the City contracted with five private ambulance companies operating through a central dispatch center for the provision of emergency service. After two serious accidents in 1978 brought to the public's attention the problem of slow response times by these private ambulance companies, the City undertook a year-long study that culminated in the

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2. Here, MAST is the public entity which oversees the ambulance service. MAST is accountable both to the City, which subsidizes its operations, and to the Emergency Physicians Advisory Board (EPAB), which reviews the clinical quality of ambulance care. MAST contracted in 1981 for ASI to provide the day to day operation of the System. Following a public bid in 1982, there is a new operations contractor, under a contract which runs until July 1985.

adoption of the public utility model. That study included a visit to Tulsa, Oklahoma, where the model was in place and first observed. Jack Stout, the architect of the model, and his company, Fourth Party, Inc., were hired to design and implement the model in Kansas City. The City then created MAST and contracted with ASI. Because only ASI possessed both the necessary state ambulance license,[3] sufficient equipment and manpower to serve the entire Kansas City population, ASI was chosen as the initial operations contractor for the system.

Obviously, petitioners are unhappy with the system as adopted, because the model prevents petitioners from operating their non-emergency ambulances within Kansas City, except in certain cases. Petitioners are private, for-profit businesses, who spurn the expensive and unprofitable emergency work in favor of profitable non-emergency transfers. In the industry, this is called "skimming the cream."

All of the City's actions (and those of its agents, MAST, Stout and Fourth Party, Inc.) were taken pursuant to authority granted by the Missouri State Legislature. R. S. Mo. § 67.300 (1978) provides that:

> 1. *Any city,* town or village *may provide a general ambulance service* for the purpose of transporting sick or injured persons to a hospital, clinic, sanitorium or other place for treatment of the illness or injury, and for that purpose *may*
>
> * * * *

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3. R. S. Mo. § 190.100 et seq. (1978) requires *all* ambulance services operating within the State of Missouri to be licensed by the State. These licenses are renewed yearly, but only after the State Bureau of Emergency Medical Services has certified the "public need and necessity" for the ambulance service.

> 2. *Contract with one or more individuals,* counties, associations *or other organizations for the operation,* maintenance and repair of any such vehicles and *for the furnishing of emergency treatment,* . . . (Emphasis added).

In addition, Chapter 190 of the Missouri Statutes contains a comprehensive anticompetitive regulatory scheme governing *all* ambulance service within the state. The licensing law, R. S. Mo. § 190.100 et seq. (1978), requires that all ambulance vehicles and operators be licensed by the State; mandates minimum equipment and insurance coverage; provides for detailed record keeping by all ambulance operators; and requires an annual determination that "public need and necessity require the proposed ambulance services," R. S. Mo. § 190.125. In accordance with the powers granted to cities by R. S. Mo. § 67.300, cities are free under the licensing law to impose additional restrictions on ambulance operators, through "any law, ordinance or regulation not in conflict with this statute," R. S. Mo. § 190.105(5). The Missouri Supreme Court has held, in *City of Raytown v. Danforth,* 560 S.W.2d 846, 859 (Mo. banc 1977), that the thrust of the licensing law is "toward control of destructive competition and improvement of [ambulance] service."

The City and MAST seek no more than the opportunity to provide the best quality care to their citizens at a reasonable cost to the public treasury. Petitioners, by contrast, are motivated by profit, not the public interest. Petitioners are trying to distort the federal antitrust laws into a weapon which would force Kansas City to abandon the public interest and return to unrestrained competition in the field, with poor response times, unnecessary deaths and high tax subsidies. These efforts should be rebuffed.

REASONS WHY THE WRIT SHOULD BE DENIED

I. There Is No Question Of General Importance Meriting Review By This Court Presented In This Case.

A. This Case Involves Only the Application of Well-Established Precedent to Specific Missouri Statutes and Case Law, and a Decision by This Court Would Have Little Impact Elsewhere.

While the outcome of this case is of vital importance to MAST and the people of Kansas City, this case has no real importance outside the state of Missouri. As petitioners admit and as the Eighth Circuit found, the outcome of this case turns on whether the language and intent of two Missouri statutes, R. S. Mo. § 67.300 and R. S. Mo. § 190.100 et seq., provide sufficient legislative authorization to bestow upon respondents immunity under the "state action" doctrine of *Parker v. Brown*, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943), *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 55 L. Ed. 2d 364, 98 S. Ct. 1123 (1978), and *Community Communications, Inc. v. City of Boulder*, 455 U.S. 40, 70 L. Ed. 2d 810, 102 S. Ct. 835 (1982). Because this case involves only Missouri law, with no application in other states, a decision here would have little precedential value.

This case is, therefore, quite unlike *City of Boulder, supra*, which clearly had national importance. In *Boulder*, this Court considered whether a city's "home rule" status, by itself, was sufficient to place that city's actions under *Parker v. Brown*. Here, the issue is whether *two specific Missouri statutes* create sufficient "state action" to im-

munize respondents' actions taken under authority granted by those statutes. A decision by this Court would not decide issues of national scope.[4] Instead, a decision here would merely unleash a flood of requests by litigants all over the United States seeking this Court's advice as to whether particular zoning laws, land use statutes, sewage disposal ordinances, taxicab regulations, and innumerable other examples of municipal regulation of commerce constitute "state action." *See generally* P. Areeda, *Antitrust Law*, §212.3b (1982 Supp.).

The Eighth Circuit in this case neither deviated from nor expanded any doctrines of this Court. Rather, the Eighth Circuit simply applied the rules laid down in *Parker, City of Lafayette* and *City of Boulder, supra.* Because Kansas City's actions are not per se "the action of the State of Missouri itself in its sovereign capacity" (App. at A14), the Eighth Circuit analyzed the City's actions under the rules laid down by this Court:

> An expression of state policy that is sufficient to establish *Parker* immunity is comprised of two elements: The legislature must have authorized the challenged activity, and it must have done so with an intent to displace competition. *See* Areeda, Antitrust Law § 212.3a, at 53 (1983 Supp.). *See also Community Communications Co. v. City of Boulder, supra*, 455 U.S. at 51-52, 102 S. Ct. at 840-841; *City of Lafayette v. Louisiana Power & Light Co., supra*, 435 U.S. at 415, 98 S. Ct. at 1138.

The Eighth Circuit applied these rules and determined that state action was present.

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4. Respondents are aware of only three other cities (Tulsa, Oklahoma; Little Rock, Arkansas; and Fort Wayne, Indiana) which have adopted all or substantial parts of the public utility model.

Petitioners do not challenge the legal standard applied by the Court of Appeals; petitioners seek review by this Court "because the Eighth Circuit's application of the 'affirmative expression and clear articulation' requirement is in error" (Petitioners' Petition at p. 13). This Court has more pressing matters at hand than deciding whether a lower court's interpretation of state statutes was erroneous. The writ should be denied.

B. The Eighth Circuit's Decision Gave Full Consideration to the Issues and Decided Them Correctly and in Harmony With All Relevant Decisions by This Court and the Courts of Appeals.

Petitioners have not attacked the Eighth Circuit's decision as being in conflict with any decisions of this Court, nor have petitioners alleged any conflict among the Circuits. Both sides agree that *City of Lafayette* and *City of Boulder* are the only cases decided by this Court which apply the state action exemption to municipal defendants. The Eighth Circuit's decision in this case is in complete harmony with those decisions.

As a plurality of this Court held in *City of Lafayette, supra,* 435 U.S. at 413, 98 S. Ct. at 1136, 55 L. Ed. 2d at 384, "the *Parker* doctrine exempts only anticompetitive conduct engaged in * * * by [municipalities], pursuant to state policy to displace competition with regulation or monopoly public service." Such a state policy may be found wherever "the state authorized or directed a given municipality to act at it did." *Id.,* 435 U.S. at 414, 98 S. Ct. at 1137, 55 L. Ed. 2d at 384. The city need not "point to a specific, detailed legislative authorization before it may properly assert a *Parker* defense to an antitrust lawsuit," *Id.,* 435 U.S. at 415, 98 S. Ct. at 1138, 55 L. Ed. 2d at 385. It is

enough, the plurality held, that "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of." *Id.*, 435 U.S. at 415, 98 S. Ct. at 1138, 55 L. Ed. 2d at 384; *accord: Town of Hallie v. City of Eau Claire*, 700 F.2d 376 (7th Cir. 1983), *application for certiorari pending*, No. 82-1832 (1983); P. Areeda, *Antitrust Law*, § 212.3 (1982 Supp.).

In *City of Boulder, supra*, this Court considered a municipality's claim to immunity by virtue of its "home rule" powers under Colorado law. The Court stated that the City's action could not be exempted from antitrust scrutiny "unless it constitutes municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy," *Boulder, supra*, 455 U.S. at 42, 70 L. Ed. 2d at 819. The Court found no evidence of such a state policy in *Boulder*, and reversed.

In this case the Eighth Circuit correctly found state authorization for Kansas City's actions in R. S. Mo. § 67.300, the statute which authorizes cities to provide ambulance service, own or lease vehicles, and "contract with one or more" persons to operate the service (App. at A70-71). The Eighth Circuit found that Kansas City's actions are in accord with a *state* policy to replace competition with regulation or monopoly public service. Such a state policy is manifested not only in § 67.300, but also in R. S. Mo. § 190.100 et seq., the state ambulance licensing law. As noted above, the licensing law places "public need and necessity" at the focal point of the decision as to whether an ambulance service will be licensed. The Eighth Circuit properly relied on the Missouri Supreme Court's interpretation of the licensing law in *City of Raytown v. Danforth*, 560 S.W.2d 846, 849 (Mo. banc 1977). In *City of Raytown* the Missouri Supreme Court held that the "thrust of the Licensing Law" was "toward control of destructive

competition and improvement of service." With such a clear expression of state policy, the Eighth Circuit's decision was not only correct, but unavoidable.

There is no conflict between the Eighth Circuit's decision and any other decision, whether of this Court or any Court of Appeals. Indeed, in the only other Circuit Court decision dealing with analogous facts, *Town of Hallie v. City of Eau Claire,* 700 F.2d 376 (7th Cir. 1983), *application for certiorari pending,* No. 82-1832 (1983), the Seventh Circuit held squarely in accord with the Eighth Circuit's decision in this case.

In *Town of Hallie,* plaintiffs were outlying towns to whom the City of Eau Claire, Wisconsin had refused to supply sewage treatment services unless the towns agreed to be annexed. The towns complained that they were prevented from competing in the market for sewage collection and transportation, and that such foreclosure violated the Sherman Act. The Seventh Circuit agreed with the District Court that Wisconsin statutes gave Eau Claire the authority to act as it had, and evinced a state policy to allow Eau Claire to restrict sewage treatment services to its city boundaries, or to require annexation as a precondition for the receipt of such services. *Id.,* 700 F.2d at 382-83. The dismissal of the plaintiffs' Complaint was, therefore, affirmed.

Town of Hallie, like this case, involved the application of well-established rules of law to a particular set of facts and state statutes. There is no inconsistency between the decision of the Seventh Circuit in *Town of Hallie* and that of the Eighth Circuit here. Again, there is simply no reason for this Court to review this case.[5]

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5. Petitioners' suggestion that this Court should combine *Town of Hallie* with this case for consideration is without merit.

(Continued on following page)

II. There Is No Reason For This Court To Accept Review Of This Case To Determine Whether The "Active State Supervision" Language In Midcal Should Apply To Municipal Defendants Under Parker.

A. The Eighth Circuit Was Correct in Determining That There Is No Need for Active State Supervision in This Case, and This Court Need Not Review That Determination.

The Eighth Circuit agreed with the Seventh Circuit's decision in *Town of Hallie* that the State need not "actively supervise" the City's anticompetitive system so long as the expression of state policy is sufficiently clear and the City is carrying out a governmental function designed to protect public health and safety. *Gold Cross,* 705 F.2d at 1014 n. 13 (App. A at A20); *Town of Hallie, supra,* 700 F.2d at 383-84 and n. 18. As both Circuit Courts, three Justices of this Court, and at least two commentators have noted, there are a number of good reasons why the "active state supervision" language of *California Liquor Dealers Ass'n v. Midcal Aluminum, Inc.,* 445 U.S. 97, 104-06, 63 L. Ed. 2d 233, 100 S. Ct. 937 (1980), should not apply to the City and its agents in this case.

Footnote continued—

The two cases, although identical in result, are substantially different factually, and need not have been decided in the same way. The Wisconsin statutes considered in *Town of Hallie* were *far less clear* in evincing state authorization to restrict services than the Missouri statutes presented here. The Seventh Circuit's decision was based on its finding that the Wisconsin statutes authorized a city to set limits on the reach of its public services. From this, the Seventh Circuit inferred a state policy to allow cities to condition such services on annexation. *Id.,* 700 F.2d at 382-83. In this case, one Missouri statute, R. S. Mo. § 67.300, *specifically authorizes* a sole-provider ambulance service; no inferences are required. *Gold Cross,* 705 F.2d at 1013; App. A at A17.

Nothing in *Parker v. Brown*, *City of Lafayette*, or *City of Boulder* mentions "active state supervision" as a prerequisite for state action immunity. The Eighth Circuit here correctly noted that state supervision was required of the *private* defendants in *Midcal* "to control the potential for abuse created by authorizing private persons to make anticompetitive decisions and to insure that those decisions are consistent with the clearly articulated and affirmatively expressed state policy at stake." *Gold Cross*, *supra*, 705 F.2d at 1014; App. A at A20; *see also Town of Hallie*, *supra*, 700 F.2d at 384. Because of the political and medical accountability inherent in Kansas City's system, *see* fn. 2, *supra*, the "potential for abuse" is simply not present in this instance.

The question decided by the Eighth and Seventh Circuits here and in *Town of Hallie* was expressly reserved by this Court in *City of Boulder*, *supra*, 455 U.S. at 51-52 n. 14, 70 L. Ed. 2d at 819 n. 14. However, the Chief Justice and Justices Rehnquist and O'Connor, dissenting in *City of Boulder*, noted that "it would seem rather odd to require municipal ordinances to be enforced by the State rather than the city itself," *Id.*, 455 U.S. at 71 n. 6, 70 L. Ed. 2d at 831. The "active supervision" prong of *Midcal*, they felt, had no application to municipal defendants acting pursuant to state policy.

Professor Areeda similarly writes that "active state supervision" is a requirement reasonably applied to *private* antitrust defendants, but unnecessary for *municipal* or *public entities* acting pursuant to an anticompetitive state policy. The real test for *Parker* immunity, Areeda holds, is whether the challenged conduct is "state action." Where there is a clearly anticompetitive state policy under which the city is operating, supervision is not required:

> Thus, requiring state authorization for local conduct is analogous to requiring active supervision of private conduct; it tests whether challenged local activity is truly state action and therefore entitled to immunity.

Areeda, *Antitrust Law, supra,* § 212.2a (1982 Supp.) at 47 (footnote omitted); *see also* P. Areeda, *Antitrust Immunity for State Action After Lafayette,* 95 Harv. L. Rev. 435, 445 and n. 49 (1981); Rogers, *Municipal Antitrust Liability in a Federalist System,* 1980 Ariz. St. L. J. 305, 340-42 (1980).

State supervision of Kansas City's restraint imposed pursuant to state policy is unnecessary because of the *political* accountability inherent in this situation. The City of Kansas City and MAST are politically accountable to the local voters, as are the state legislators who authorized Kansas City's system. Should abuse become apparent, MAST and the city ambulance system can be further regulated or in fact swept away by the City Council. Should the City ignore any abuse, the state legislature could amend R. S. Mo. § 190.105 to require that cities permit *all* holders of state ambulance licenses to operate within the city.

Finally, both the Seventh and Eighth Circuits recognized that state supervision of local governmental decisions is unwise. The Eighth Circuit in this case noted that "to require the state to supervise Kansas City's ambulance system . . . makes little sense." *Gold Cross,* 705 F.2d at 1014, App. A at A21. The Eighth Circuit echoed the concerns expressed by the Seventh Circuit in *Town of Hallie,* 700 F.2d at 384, that requiring state supervision over local governmental activities would unnecessarily burden limited state resources and would encourage "duplicative, wasteful regulation and could erode the local autonomy

that the state has sought to encourage." *Gold Cross,* 705 F.2d at 1015, App. A at A22; *Town of Hallie,* 700 F.2d at 384. The Seventh Circuit also hesitated to impose a standard that would require courts to decide how "active" state supervision must be in order to pass muster, 700 F.2d at 384.

Each of these concerns is legitimate and compelling, and each demonstrates the lack of merit in petitioners' position. Petitioners argue that the absence of state supervision will allow cities to implement their own policies without regard to the effects of such policies on neighboring political subdivisions (Petition at 19). The answer, of course, is that such can happen *only if* that result is contemplated by the state legislature and is, in fact, *state policy.* If the legislature has expressed a policy that each local government is authorized to restrict competition in furtherance of a governmental function[6] and may do so without regard to its neighbors, then such is in fact a *state* policy, not a reflection of "local parochial interests." The Court of Appeals' decision on this issue was correct, and review would be futile.

B. Because the District Court in This Case Found That There Is Sufficient Active State Supervision, and the Court of Appeals Held Such Finding Not Clearly Erroneous, This Is Not the Proper Case for This Court to Review the Application of Midcal to Municipal Defendants.

Should this Court wish to decide the question left open in *City of Boulder* concerning the necessity of state supervision of local governmental actions, nonetheless this would

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6. The Eighth Circuit clearly restricted its holding to this case involving a "traditional governmental function to protect public health and safety," 705 F.2d at 1014 n. 13, App. A at A20.

not b the appropriate case for such a determination. The Eighth Circuit's decision noted that while the District Court did not *need* to apply "active state supervision" to the actions at issue, the District Court nevertheless did so (App. B, A50-52). The District Court noted the regulatory interplay between R. S. Mo. § 67.300 and R. S. Mo. § 190.100 et seq., the clearly governmental nature of Kansas City's actions, and the strict oversight of MAST by the City Director of Health and the Emergency Physicians Advisory Board (App. B at A51-52), and held that there was sufficient state supervision to satisfy the second prong *Midcal*. The Eighth Circuit held that the District Court's finding on this issue was not clearly erroneous, *Gold Cross,* 705 F.2d at 1015 n. 15; App. A at A22.

Because there is a finding of active state supervision in this case, a decision by this Court holding whether such supervision is necessary would not alter the outcome of this case, and would therefore be no more than an advisory opinion. This Court normally refuses to render such advisory opinions, *cf. Bell v. Maryland,* 378 U.S. 226, 237, 12 L. Ed. 2d 822, 830, 84 S. Ct. 1814 (1964); *Preisser v. Newkirk,* 422 U.S. 395, 402-03, 45 L. Ed. 2d 272, 278, 95 S. Ct. 2330 (1975); *New Jersey v. Portash,* 440 U.S. 450, 465-68, 59 L. Ed. 2d 501, 514-15, 99 S. Ct. 1292 (1979) (Blackmun, J., dissenting); *Wilson v. Cook,* 327 U.S. 474, 490, 90 L. Ed. 793, 805 (1946) (Rutledge, J., dissenting), and need not render one in this instance.

CONCLUSION

Petitioners ask that this Court do no more than review the Eighth Circuit's application of a well-established rule of law to a particular and insular set of facts, and further ask for an advisory opinion on an issue of law that has been correctly decided (although it need not have been) by the District Court and the Court of Appeals. None of the criteria upon which this Court usually accepts certiorari are present. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

GEORGE E. LEONARD
Counsel of Record
RUSSELL S. JONES, JR.
SHUGHART, THOMSON & KILROY, P.C.
922 Walnut Street
P. O. Box 13007
Kansas City, Missouri 64199
(816) 421-3355
Counsel for Respondents MAST, ASI, Jack Stout and Fourth Party, Inc.

and

WILLIAM D. GEARY
Law Department of the City of Kansas City, Missouri
414 East 12th Street
Kansas City, Missouri 64106
Counsel of Record for Respondent City of Kansas City, Missouri